Office-Supreme Court, U. S.
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HAROLD B. WILLEY, Clerk

TRANSCRIPT OF RECORD

IN THE

Supreme Court of the United States

October Term, 1953

No. [redacted] 15

AUSTIN F. McFEE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9-18-53

No. 13482

United States
Court of Appeals
for the Ninth Circuit

AUSTIN F. McFEE, Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Northern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Special Assistant U. S. District Attorney,
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Attorneys for Appellee.

In the United States District Court for the District of Idaho, Northern Division

No. 4412

UNITED STATES OF AMERICA,

vs.

AUSTIN F. McFEE, Defendant.

INDICTMENT

Vio. Sec. 145 (b) Internal Revenue Code; 26 USC Sec. 145 (b)

The Grand Jury charges:

Count One

That on or about the 11th day of March, 1946, in the District of Idaho, Austin F. McFee, late of Wallace, Idaho, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Idaho, at Boise, Idaho, a false and fraudulent income tax-return wherein he stated that his net income for said calendar year was the sum of $25,166.67 and that the amount of tax due and owing thereon was the sum of $10,021.05, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $105,077.90, upon which said net income he owed to the United States of America an income tax of $71,076.35.

In violation of Section 145 (b), Internal Revenue Code; 26 U.S.C., Section 145 (b).

Count Two

That on or about the 15th day of March, 1947, in the District of Idaho, Austin F. McFee, late of Wallace, Idaho, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Idaho, at Boise, Idaho, a false and fraudulent income tax-return wherein he stated that his net income for said calendar year was the sum of $39,679.01 and that the amount of tax due and owing thereon was the sum of $18,091.35, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $113,748.77, upon which said net income he owed to the United States of America an income tax of $74,881.45.

In violation of Section 145 (b), Internal Revenue Code; 26 U.S.C., Section 145 (b).

A True Bill.

/s/ MYRON SWENDSEN,
Foreman

/s/ PAUL S. BOYD,
Assistant U. S. Attorney

Presented by the Foreman in open court and filed in the presence of the Grand Jury Nov. 8, 1951.

[Endorsed]: Filed Nov. 8, 1951.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR BILL OF PARTICULARS

To: John Carver, Esquire, United States District Attorney:

You will please take notice, and are hereby notified that upon the annexed affidavit, J. F. Emigh, Esquire, of counsel for the defendant in the above entitled action, duly sworn to on the 29th day of March, 1952, the indictment herein, a copy of which is annexed hereto, and upon all the proceedings heretofore had herein, the undersigned will move this Court, at the Court Room in said Court on the 1st day of April, 1952, at the United States Court House in the City of Coeur d'Alene, State of Idaho, at 10:30 o'clock a.m., or as soon thereafter as counsel can be heard, for an order directing the Honorable United States District Attorney for the District of Idaho, to furnish to the undersigned a Bill of Particulars of the indictment herein, as follows:

1. Informing and advising defendant and his counsel, of all of the sources of, and each source of, all items of taxable income which it is charged in Count One of the indictment on file herein, defendant Austin F. McFee did receive in the taxable year 1945, and which was by him not reported, and not included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, in excess of $25,166.67, constitu-

ting and comprising the sum of $105,077.90 (including said sum of $25,166.67) as alleged and charged in Count One of the indictment herein, to be net income.

2. Fully informing and advising defendant and his counsel of the items and amounts of each item of taxable income which it is charged in Count One of the indictment on file herein, the defendant A. F. McFee did receive in the taxable year 1945 and by him not reported and included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, constituting and comprising the sum of $105,077.90 (including the said sum of $25,166.67, reported by defendant) as charged and alleged in Count One of the indictment herein, to be net income.

3. The name or names of all persons, firms and corporations from whom it is charged in Count One of the indictment on file herein, the defendant Austin F. McFee did receive in the taxable year 1945, income by him not reported and included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, constituting and comprising the sum of $105,077.90 (including said sum of $25,166.67, reported by defendant) charged and alleged in Count One of the indictment herein to have been received and not reported by defendant.

4. Informing and advising defendant and his counsel, of all of the sources of, and each source of, all items of taxable income which it is charged in

Count Two of the indictment on file herein, defendant Austin F. McFee did receive in the taxable year 1946, and which was by him not reported, and not included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, in excess of $39,679.01, constituting and comprising the sum of $113,748.77 (including said sum of $39,679.01) as alleged and charged in Count Two of the indictment herein, to be net income.

5. Fully informing and advising defendant and his counsel of the items and amounts of each item of taxable income which it is charged in Count Two of the indictment on file herein, the defendant A. F. McFee did receive in the taxable year 1946 and by him not reported and included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, constituting and comprising the sum of $113,748.77 (including the said sum of $39,679.01, reported by defendant) as charged and alleged in Count Two of the indictment herein, to be net income.

6. The name or names of all persons, firms and corporations from whom it is charged in Count Two of the indictment on file herein, the defendant Austin F. McFee did receive in the taxable year 1946, income by him not reported and included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, constituting and comprising the sum of $113,748.77 (including said sum of $39,679.01 reported by de-

fendant) as charged and alleged in Count Two of the indictment herein to have been received and not reported by defendant.

7. And for such other relief as to the Court may seem just and proper.

Dated April 1, 1952.

/s/ J. F. EMIGH,
/s/ JAMES P. KEANE,
Attorneys for Defendant

[Printer's Note: The attached Indictment is a duplicate of Indictment set out in full at pages 3 and 4 of this printed record.]

EXHIBIT A

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR BILL OF PARTICULARS

State of Montana,
County of Silver Bow—ss.

J. F. Emigh, being first duly sworn, deposes and says: that he is an attorney of law, duly admitted and licensed to practice law in all of the courts of the State of Montana, in the Federal Court of the District of Montana, in the Federal Court of the District of Idaho, and in the United States Court of Appeals; that he has been engaged as one of the attorneys to represent the defendant Austin F. McFee, above named; and that over a period of several

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months, he has been working with the accountants for the defendant in regard to alleged failure of defendant to report gross earnings of income during the year 1945 and 1946; that as Affiant is informed by the accountants for said defendant, Austin F. McFee, neither the books of account of said defendant nor the bank records of said defendant, or other records of said defendant known by the said accountants to exist or known by Affiant to exist, reflect or disclose gross income for the years 1945 and 1946 in excess of the amount of defendant Austin F. McFee, duly reported in his income tax returns for said respective years; that as Affiant is informed and believes, and states on information and belief, the information for and computation of the income alleged by the Government to have been received for the calendar year ending December 31, 1945, in the sum of $105,077.90, is made up of $25,166.67, appearing on the books and records of said Austin F. McFee, and by him reported, and the remainder upon some alleged information obtained by the officers and agents of the Government wholly unknown to Affiant; that as affiant is informed and believes and believes and states on information and belief, the information for and computation of the income alleged by the Government to have been received for the calendar year ending December 31, 1946, in the sum of $113,748.70, is made up of $39,679.01, appearing on the books and records of said Austin F. McFee and by him reported, and the remainder upon some alleged information obtained by the officers and agents of the Government,

unknown to affiant and not shown on the books and records of defendant; that inasmuch as the indictment on file herein, both as to Count One and as to Count Two does not advise the defendant and his counsel of the source or sources, or nature of income claimed by the Government to not have been reported by the defendant, nor the person or persons from whom said income is alleged to have been received, said defendant can not, nor can defendant's attorneys adequately prepare a defense to Counts One and Two of the Indictment, and said defendant and his attorneys can not be prepared to meet the Government's testimony and evidence by reason of ignorance of the Government's claims as to income not reported, and will, unless being informed thereon in the particulars requested in defendant's motion for a Bill of Particulars, herewith filed, be taken by surprise at the time of the trial, will not be able to make adequate defense to the indictment, and will thereby be greatly and materially prejudiced in the matter of having a fair trial in said action.

Wherefore Affiant Prays:

That the motion of defendant herein be granted to the end that in the discharge of their duties as officers of this Court and attorneys of the Bar of this Court, counsel will be able to safe-guard and protect the rights of the defendant and properly discharge their duties in the premises.

/s/ J. F. EMIGH

Subscribed and sworn to before me this 28th day of March, 1952.

[Seal] /s/ JOHN T. MULLANY,
Notary Public for the State of Montana, residing at Butte, Montana. My Commission expires August 15, 1952.

Acknowledgment of Service attached.

[Endorsed]: Filed April 1, 1952.

[Title of District Court and Cause.]

NOTICE OF AMENDED AND SUPPLEMENTAL MOTION FOR BILL OF PARTICULARS

To: John Carver, Esquire, United States District Attorney:

You will please take notice, and are hereby notified that upon the affidavit, J. F. Emigh, Esquire, of counsel for the defendant in the above entitled action, duly sworn to on the 29th day of March, 1952, filed herein, a copy of which is annexed hereto, the indictment herein, a copy of which is annexed hereto, and upon all proceedings heretofore had herein, the undersigned will move this Court, at the Court Room in said Court on the 2nd day of April, 1952, at the United States Court House in the City of Coeur d'Alene, State of Idaho, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, for an order directing the Honorable United States

District Attorney for the District of Idaho, to furnish to the undersigned a Bill of Particulars of the indictment herein as follows:

1. Advising and informing defendant and his counsel of the theory of the prosecution of this case, as to whether or not, the case will be prosecuted and tried on the theory that the defendant during the years 1945 and 1946, as embraced within counts one and two of indictment, received items of income and amounts of income during said years, which will be specifically presented by evidence of the amounts paid, the sources of the amount received and the persons, firms or corporations paying the same; or whether said counts will be sought to be proved upon a net worth theory, that is to say, whether the Government will attempt to establish by evidence over a series of years that the defendant had a certain net worth, that is to say, certain sums available for expenditures and that said defendant did for the respective years, charged in counts one and two of the indictment, expend monies greater than his net worth, at the beginning of the respective years, plus reported income, less net worth at the end of each year, making up the said gross sums for each of said years in said respective counts by the Government alleged to have been received by the defendant and not reported in his income tax return for each of said years.

2. That if the Government intends to rely for proof of the counts charged upon specific items of income alleged to have been received during the

years 1945 and 1946 respectively, then, that the plaintiff be required to provide in said bill of particulars the following information:

A. Informing and advising defendant and his counsel, of all the sources of, and, each source of, all items of taxable income which it is charged in Count One of the indictment on file herein, defendant Austin F. McFee did receive in the taxable year 1945, and which was by him not reported, and not included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, in excess of $25,166.67, constituting and comprising the sum of $105,077.90 (including said sum of $23,166.67) as alleged and charged in Count One of the indictment herein, to be net income.

B. Fully informing and advising defendant and his counsel of the items and amounts of each item of taxable income which it is charged in Count One of the indictment on file herein, the defendant A. F. McFee did receive in the taxable year 1945 and by him not reported and included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, constituting and comprising the sum of $105,077.90 (including the said sum of $25,166.67, reported by defendant) as charged and alleged in Count One of the indictment herein, to be net income.

C. The name or names of all persons, firms and corporations from whom it is charged in Count One of the indictment on file herein, the defendant Aus-

tin F. McFee did receive in the taxable year 1945, income by him not reported and included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, constituting and comprising the sum of $105,077.90 (including said sum of $25,166.67, reported by defendant) charged and alleged in Count One of the indictment herein to have been received and not reported by defendant.

D. Informing and advising defendant and his counsel of all of the sources of, and each source of, all items of taxable income which it is charged in Count Two of the indictment on file herein, defendant Austin F. McFee did receive in the taxable year 1946, and which was by him not reported, and not included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, in excess of $39,679.01, constituting and comprising the sum of $113,748.77 (including said sum of $39,679.01) as alleged and charged in Count Two of the indictment herein, to be net income.

E. Fully informing and advising defendant and his counsel of the items and amounts of each item of taxable income which it is charged in Count Two of the indictment on file herein, the defendant A. F. McFee did receive in the taxable year 1946 and by him not reported and included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, constituting and comprising the sum of $113,748.77 (including

the said sum of $39,679.01, reported by defendant) as charged and alleged in Count Two of the indictment herein, to be net income.

3. That if the Government intends to establish the facts charged in the indictment by circumstantial evidence, that is, by estimate of net worth of defendant at the commencement of the years embraced within each respective count of the indictment and during the period of each respective count alleged, and proposes to show by evidence of expenditures during said years in excess of the claimed net worth of defendant at the beginning of each respective term, plus reported income, less net worth of defendant at the end of each period, the amount of unreported income, then, if such theory is employed, that defendant be furnished a bill of particulars informing him as to the following:

A. The year or years in respect to which evidence will be introduced by the Government, as to the net worth income and deductions of defendant forming the basis of the claims of the Government as to net worth of the defendant at the beginning of each year as to which the indictment charges unreported income, and

B. That as to each of said years, defendant be informed of the claimed net worth of the defendant for each year of the period over which and during which, testimony and evidence will be offered to prove the element of net worth of defendant at the commencement of the calendar year 1945, and commencement of calendar year 1946.

C. And that the defendant be informed of the amount of the alleged gross income and deductions from gross income and deductions from gross income allowed by the Government agency during each of said years over which the computation to be employed by the Government, will be based.

4. That if the Government intends to rely upon some other or different theory to prove its case, defendants be furnished particulars of such theory and the nature of proof and method of proof to be employed.

5. And for such other relief as to the Court may seem just and proper.

Dated April 1, 1952.

/s/ J. F. EMIGH,
/s/ JAMES P. KEANE,
Attorneys for Defendant

[Printer's Note: The attached Affidavit in Support of Motion for Bill of Particulars is a duplicate of Affidavit set out in full at pages 8 to 10; Indictment is a duplicate of Indictment set out in full at pages 3 and 4 of this printed record.]

[Endorsed]: Filed April 2, 1952.

In the United States District Court for the District of Idaho, Northern Division

[Title of Cause.]

MINUTE ORDER

Comes now the District Attorney with the defendant and his counsel into court, whereupon, the Court ordered the plaintiff to furnish the defendant with a bill of particulars sufficient so that he will not be taken by surprise.

Dated: April 2, 1952.

[Title of District Court and Cause.]

BILL OF PARTICULARS

Pursuant to the opinion of the Court on defendant's motion for a bill of particulars, the United States of America herewith submits said bill:

I.

The source of the defendant's income for the years 1945 and 1946, to the government's knowledge, is limited to those sources reported by the defendant for income tax purposes for said years.

II.

During the years of 1945 and 1946 the defendant's private expenditures in excess of his known and declared resources were as follows:

Nature of Expenditures	Year 1945	Year 1946
Purchases of Bank Exchange		$17,800.00
Purchase of stocks		10,000.00
Funds invested in businesses	$28,800.00	29,250.00
Payment of fines		10,000.00
Payment of attorney fees		3,000.00
Loans made	44,613.06	8,400.00
Loans repaid	7,789.13	12,637.68
Total	$81,202.19	$91,087.68
Less: Known Private Resources		
Miscellaneous receipts not deposited in bank accounts	123.76	544.02
Repayment of loans		1,000.00
Proceeds of Company check cashed		15,000.00
Total	123.76	16,544.02
Total Unexplained Private Expenditures	$81,078.43	$74,543.66
Less: Credit given for allowable deductions in connection with equipment alleged stolen—not claimed on income tax return	1,167.20	473.90
Amount alleged by Government in the indictment not reported by the defendant in his income tax return	$79,911.23	$74,069.76
	Count I	Count II
Viz: Amount alleged in indictment as taxpayer's net income for the year	105,077.90	113,748.77
Net income reported in tax return	25,166.67	39,679.01
Amount alleged as not reported by taxpayer defendant	$79,911.23	$74,069.76

III.

The government proposes to prove that defendant's unexplained private expenditures, as set out herein above in Paragraph II, were not made by defendant from his declared available resources as

reflected by defendant's business books and private bank accounts. That is to say, the government proposes to prove that defendant could not have made such expenditures from current reported earnings or from funds which he had accumulated on the books and bank accounts of his various business enterprises and/or his private bank accounts.

From 1936 to and including 1944 all of defendant's business was conducted through various business enterprises known to the government, principally the North Idaho Sales Company, and those operations reflected on the books of those enterprises. Defendant's books reflect his original investment in his business enterprises and his earnings through those businesses during that period of years, namely, 1936 through 1944, which coincides with the income reported for income tax purposes, except for certain adjustments made by Internal Revenue Agents who examined the income tax returns for years prior to 1941, with respect to which adjustments the defendant, or his authorized representative, was furnished a written report.

Dated this 2nd day of April, 1952.

/s/ JOHN A. CARVER,
United States Attorney for the District of Idaho

/s/ DUDLEY L. WILSON,
Special Asst. U. S. Attorney for the District of Idaho

Acknowledgment of Service attached.
[Endorsed]: Filed April 3, 1952.

[Title of District Court and Cause.]

MOTION FOR CONTINUANCE

The defendant moves for an order continuing said cause over the term on the following grounds:

1. The affidavit of J. F. Emigh.
2. The affidavit of Harold S. Purdy.
3. The records and files in said cause.
4. That said defendant can not safely go to trial at this term for the reasons stated in said affidavits.

/s/ J. F. EMIGH,
Attorney for Defendant
/s/ HAROLD S. PURDY

Acknowledgment of Service attached.

[Endorsed] Filed April 4, 1952.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE

State of Idaho,
County of Kootenai—ss.

Harold S. Purdy, being first duly sworn upon his oath deposes and says:

That he is a duly licensed and practicing attorney, of the State of Idaho, and entitled to practice in the above entitled Court.

That on April 1, 1952, and after the arraignment of the defendant, Austin F. McFee, in the above entitled matter, the said defendant Austin F. McFee, and his attorney J. F. Emigh, called at my

office, for the purpose of associating me, in the representation, of the defendant Austin F. McFee, in the defense of the above entitled action, and at that time, handed me a copy of the indictment and informed me that said case had been definitely set for trial on the 22nd day of April, 1952.

I was of the opinion that under the indictment, the Government could have proceeded on at least two recognized theories of law, or any other theory, that might have been known to them, and a motion was then prepared for presentation to the Court, requiring the Government to furnish a bill of particulars, and on the 2nd day of April, 1952, the Court required the Government, to furnish a bill of particulars, setting forth the theory upon which they would proceed.

That thereafter, on the 3rd day of April, 1952, the Government furnished the defendant, with a bill of particulars, which indicates that the Government's evidence will consist of books, reports and records of the defendant over a period of years, dating back as far as 1936 and including the year 1944, and using those figures as a basis for unreported and unexplained expenditures in the year 1945 and 1946.

Affiant is of the opinion, that it will be necessary, to trace funds belonging to defendant, for as far back as the year 1936 and likely for many years prior thereto, in order to account for any unexplained expenditures, referred to in the bill of particulars furnished defendant.

That if this can be successfully accomplished, and

established, it would constitute a complete and absolute defense to said indictment.

That during the period of defendant's business operations, for many years he has conducted business in the States of Washington, Idaho, Montana and probably other states; that his books and records are not centrally located. That it will be necessary to locate, contact and interview various witnesses, to explain, and establish availabity of funds, during the years covered by the indictment and bill of particulars and to cover unexplained expenditures, during the years 1945 and 1946, if any such funds were available, as defendant maintains they were, and to check such information against defendant's books, records and reports to determine if the items relied upon are or are not included therein. The witnesses who may be able to establish the facts necessary to defendant's defense are scattered over a number of states and some may, and doubtless will, be difficult to locate. That the period of time over which investigation in behalf of defendant must be made is in excess of sixteen (16) years. That affiant is informed and believes that the Government has been for a period in excess of six (6) years, using numerous agents in procuring the evidence which will be relied upon to establish the Government's case.

That affiant has not had an opportunity to generally discuss with the said defendant, defendant's various business transactions.

That with only eighteen (18) days prior to trial, it appears that J. F. Emigh and affiant, exerting an

honest effort, to prepare such matter, can not fully and completely prepare the defense to said action within the time remaining, and to conduct the necessary legal research, in order that defendant's defense will be fairly submitted.

That affiant is of the opinion that a continuance as requested for the purposes herein set forth, will not in any manner prejudice the Government's case, and that if said continuance is denied, that said defendant's defense will be seriously prejudiced and handicapped.

/s/ HAROLD S. PURDY

Subscribed and sworn to before me this 4th day of April, 1952.

[Seal] /s/ ELEANOR M. PAVLAK,
Notary Public for State of Idaho. Residing at Coeur d'Alene, Idaho.

[Endorsed]: Filed April 4, 1952.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE

State of Idaho,
County of Kootenai—ss.

J. F. Emigh, being first duly sworn upon his oath deposes and says:

That he is one of the attorneys for the defendant in the above entitled action. That affiant has read the affidavit of Harold S. Purdy, filed herewith, knows the contents thereof and states that to the

best of his knowledge, information and belief, said affidavit is true.

That affiant for some months prior to the indictment in this proceeding had been attorney representing Austin F. McFee, the defendant in the tax matter out of which the present case arose. That however, in connection with affiant's work, he consulted with Messrs. Newland and Blinn, certified public accountants, being the accountants representing defendant, Austin F. McFee, for the most part. That affiant never, prior to his employment in this case, had an opportunity, nor did he, question Mr. McFee at any length or detail respecting matters which would constitute a defense in the present case nor has affiant at any time prior to said employment, been familiar with the details of the case, relying entirely on advice from time to time as certain matters arose as to what the accountants had discovered in the books of account of the defendant and in the defendant's records. That on or about the 11th or 12th day of March, 1952, he received a notice dated February 29, 1952 from Mr. Boyd, assistant United States District Attorney, that arraignment in the said cause was set for April 1, 1952. That affiant immediately contacted Mr. McFee, who came to Butte on or about March 13th, 1952, to make arrangements to employ affiant as one of his attorneys. That affiant resides in Butte, Montana and understood under the rules of this Court that it was necessary to be associated with some Idaho attorney. That affiant did not have an opportunity to consult Mr. McFee as to his defenses to the action nor

could affiant do so for the reason that the indictment did not disclose the Government's theory of the case and did not contain a statement of the particular circumstances of the offenses charged, to enable affiant to prepare a defense. That upon motion for a bill of particulars and amended and supplemental motion for bill of particulars presented April 1st and 2nd respectively, a bill of particulars was furnished from which it appears that the Government relies, to establish the unreported income charged in the indictment for the years 1945 and 1946, upon the income tax reports and books of record of the defendant over a period of some sixteen (16) years. That affiant has no familiarity with these income tax reports or with these records. That defendant has stated to affiant that if given time, he is convinced that he can establish that the income alleged to have been received by him and unreported for the years 1945 and 1946, consisting, as the Government maintains in the bill of particulars, of unexplained expenditures, can be shown to have been funds available for expenditure in said years by defendant but not consisting of earnings or income for said year. Affiant has had no opportunity to prepare an adequate defense in this case. That it will require many weeks to do so for the reason stated in the affidavit of Harold S. Purdy, filed herewith.

That arrangements for the participation of Mr. Purdy in this case were not completed until after the arraignment of defendant on the 1st day of April, 1952. That affiant believes defendant can not

proceed to trial during the current term of Court, without great prejudice.

That defendant cannot adequately prepare his defense during the current term of Court, or for some weeks thereafter.

Further affiant sayeth not.

/s/ J. F. EMIGH

Subscribed and sworn to before me this 3rd day of April, 1952.

/s/ M. LUCILLE DOLAN,
Notary Public for State of Idaho, residing at Coeur d'Alene, Idaho. My commission expires April 24, 1952.

[Endorsed]: Filed April 4, 1952.

In the United States District Court for the District of Idaho, Northern Division

[Title of Cause.]

MINUTE ORDER

This cause came on for hearing on defendant's motion for a continuance, John A. Carver appearing for the United States, and Harold S. Purdy for the defendant. Upon inquiry of the Court, counsel for the defendant stated he wished to submit the motion without argument, whereupon the Court announced that the motion was overruled.

Dated: April 4, 1952.

[Title of District Court and Cause.]

AMENDED BILL OF PARTICULARS

Now Comes the plaintiff and moves that Paragraph II of the Bill of Particulars filed with this Honorable Court on April 3, 1952, be amended and revised so that it now reads as follows:

II.

During the years of 1945 and 1946 the defendant's private expenditures in excess of his known and declared resources were as follows:

Nature of Expenditures	1945	1946
Purchases of Bank Exchange		$14,000.00
Purchases of stocks		10,000.00
Funds invested in business	$28,800.00	29,250.00
Payment of fines		16,500.00
Payment of attorney fees		3,000.00
Loans made	44,613.06	8,400.00
Loans repaid	7,789.13	5,637.68
	$81,202.19	$86,787.68
Less: Known Private Resources		
Miscellaneous receipts not deposited in bank accounts	123.76	544.02
Repayment of loans		1,000.00
Proceeds of Company check cashed		15,000.00
Total	$ 123.76	$16,544.02
Total unexplained private expenditures	$81,078.43	$70,243.66
Less: Credit given for allowable deductions in connection with equipment alleged stolen—not claimed on income tax return	1,167.20	473.90
Amount alleged by Government in the indictment not reported by the defendant in his income tax return	$79,911.23	$69,769.76

	1945 Count I	1946 Count II
Viz: Amount alleged in indictment as taxpayer's net income for the year	105,077.90	113,748.77
Net income reported in tax return	25,166.67	39,679.01
Amount alleged as not reported by taxpayer defendant	$79,911.23	$74,069.76
Differences	0	4,300.00

Dated this 22d day of April, 1952.

JOHN A. CARVER,
United States Attorney for the District of Idaho

/s/ DUDLEY L. WILSON,
Special Asst. U. S. Attorney for the District of Idaho

Acknowledgment of Service attached.

[Endorsed]: Filed April 22, 1952.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT FOR ACQUITTAL AT CLOSE OF PLAINTIFF'S CASE

Now comes Austin F. McFee, defendant above named, and at the close of evidence and testimony on behalf of the plaintiff, United States of America, and the attorney for the plaintiff, having stated to the Court that plaintiff rested and had completed its case in chief, and moves this Honorable Court through his attorneys of record to enter the order of judgment of acquittal of the offense charged in

Count One of the indictment against the said defendant Austin F. McFee, on the grounds and for the reasons:

1. That plaintiff has wholly failed to prove and establish beyond a reasonable doubt, all of the material facts and allegations alleged in Count One of said indictment.

2. That the nature of evidence adduced in behalf of plaintiff is in its entirety circumstantial and that the circumstances as a whole are not of such a nature as to exclude every reasonable hypothesis but that of guilty.

Now comes Austin F. McFee, defendant above named, and at the close of evidence and testimony on the behalf of the plaintiff, United States of America, and the attorney for the plaintiff, having stated to the Court that plaintiff rested and had completed its case in chief, and moves this Honorable Court through his attorneys of record to enter the order of judgment of acquittal of the offense charged in Count Two of the indictment against the defendant Austin F. McFee, on the grounds and for the reasons:

1. That plaintiff has wholly failed to prove and establish beyond a reasonable doubt, all of the material facts and allegations alleged in Count Two of said indictment.

2. That the nature of evidence adduced in behalf of plaintiff is in its entirety circumstantial and that the circumstances as a whole are not of such a na-

ture as to exclude every reasonable hypothesis but that of guilty.

Dated this 28th day of April, 1952.

/s/ J. F. EMIGH,
/s/ HAROLD S. PURDY,
Attorneys for defendant, Austin F. McFee

[Endorsed]: Filed April 28, 1952.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL AT CLOSE OF ALL TESTIMONY

Comes now the defendant Austin F. McFee and at the close of all the evidence and testimony in this case, in behalf of the plaintiff, United States of America and in behalf of the defendant, Austin F. McFee and after the respective counsel for the United States of America and said defendant have stated with the Court that each of said parties have rested and completed its case and moves this Honorable Court to order the entry of judgment of acquittal of all offenses charged in the entry of judgment of acquittal of all offenses charged in the indictments on the following grounds and for the following reasons:

1. That plaintiff has wholly failed to prove and establish beyond a reasonable doubt, all of the material facts and allegations alleged in Count One of said indictment.

2. That the nature of evidence adduced in behalf of plaintiff is in its entirety circumstantial and that the circumstances as a whole are not of such a nature as to exclude very reasonable hypothesis but that of guilty.

Comes now the defendant Austin F. McFee and at the close of all the evidence and testimony in this case, in behalf of the plaintiff, United States of America and in behalf of the defendant, Austin F. McFee, and after the respective counsel for the United States of America and said defendant have stated with the Court that each of said parties have rested and completed its case and moves this Honorable Court to order the entry of judgment of acquittal of all offenses charged in the indictments on the following grounds and for the following reasons:

1. That plaintiff has wholly failed to prove and establish beyond a reasonable doubt, all of the material facts and allegations alleged in Count Two of said indictment.

2. That the nature of evidence adduced in behalf of plaintiff is in its entirety circumstantial and that the circumstances as a whole are not of such a nature as to exclude every reasonable hypothesis but that of guilty.

Dated this 30th day of April, 1952.

/s/ J. F. EMIGH,
/s/ HAROLD S. PURDY,
Attorneys for defendant Austin F. McFee

[Endorsed]: Filed April 30, 1952.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above entitled cause, find the defendant, Austin F. McFee, Guilty on count one, and Guilty on count two, as charged in the indictment.

/s/ JAMES A. PAYNE,
Foreman

[Endorsed]: Filed May 1, 1952.

In the District Court of the United States, District of Idaho, Northern Division

No. 4412

UNITED STATES OF AMERICA

vs.

AUSTIN F. McFEE

JUDGMENT AND COMMITMENT

Indictment in two counts for violation of U.S.C., Title 26, Sec. 145(b) Internal Revenue Code.

On this 1st day of May, 1952, came the United States Attorney, and the defendant Austin F. McFee appearing in proper person, and by counsel and,

The defendant having been convicted on verdict of guilty of the offenses charged in the Indictment in the above-entitled cause, to wit: wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar years

1945 and 1946, and the defendant having been now asked whether he has anything so say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one year and 6 months and pay a fine of $7,500 on count 1, and one year and 6 months and pay a fine of $7,500 on count 2, and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that imprisonment on count 2 run consecutive to term of imprisonment on count 1. It is ordered that imprisonment on count 2 be suspended, and defendant placed on probation for 2 years, said probation period to begin after serving sentence on count 1. One of the conditions of the probation is that the defendant pay the amounts due the government on income tax.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ CHASE A. CLARK,
United States District Judge

[Endorsed]: Filed May 1, 1952.

[Title of District Court and Cause.]

ORDER

Upon application of counsel for the defendant, and good cause appearing,

It Is Ordered That sentence of imprisonment be stayed up to and including July 1, 1952 upon payment of fines, by 4 o'clock p.m., May 2, 1952, of $7,500 on count 1 and $7,500 on count 2.

Dated at Coeur d'Alene, Idaho, this 2nd day of May, 1952.

/s/ CHASE A. CLARK,
United States District Judge

[Endorsed]: Filed May 2, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

1. Name and address of Appellant: Austin F. McFee, Samuels Hotel, Wallace, Idaho.

2. Names and addresses of appellant's attorneys: Harold S. Purdy, P.O. Box 301, Coeur d'Alene, Idaho; J. F. Emigh, 47 North Main Street, Butte, Montana.

3. Offenses: Violation: Title 18, USCA, Section 145(b) - Section 145(b) Internal Revenue Code; Wilful attempt to defeat and evade income tax, County One—year 1945; Title 18, USCA, Section 145(b) - Section 145(b) Internal Revenue Code;

Wilful attempt to defeat and evade income tax, Count Two—year 1946.

4. Date of judgment: May 1, 1952.

5. Brief description of judgment and sentence: (a) Adjudged, convicted upon verdict of guilty of offense of wilfully and knowingly, attempting to defeat and evade income taxes for calendar year 1945 by filing false and fraudulent tax returns, as charged in Count One of the indictment. Adjudged that appellant be committed to custody of Attorney General for 18 months and pay a fine of $7,500.00. (b) Adjudged, convicted upon verdict of guilty of offense of wilfully and knowingly, attempting to defeat and evade income taxes for calendar year 1946 by filing false and fraudulent tax returns, as charged in Count Two of the indictment. Adjudged that appellant be committed to custody of Attorney General for 18 months and pay a fine of $7,500.00.

6. Not confined.

I, Austin F. McFee, the above named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment above mentioned.

Dated May 12, 1952.

/s/ AUSTIN F. McFEE,
Appellant

[Endorsed]: Filed May 12, 1952.

[Title of District Court and Cause.]

APPEARANCE BOND

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the United States of America the sum of Ten Thousand Dollars ($10,000.00).

The condition of this bond is that the defendant Austin F. McFee is to appear in the District Court of the United States for the District of Idaho at Coeur d'Alene, Idaho, in accordance with all orders and directions of the Court relating to the appearance of the defendant before the Court in the case of United States vs. Austin F. McFee, File number N-Cr., 4412; and if the defendant appears as ordered, then this bond is to be void, but if the defendant fails to perform this condition payment of the amount of the bond shall be due forthwith. If the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the District Court of the United States for the District of Idaho against each debtor jointly and severally for the amount above stated together with interests and costs, and execution may be issued or payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

This bond is signed on this 20th day of June, 1952, at Boise, Idaho.

Name of Defendant: Austin F. McFee, Samuels Hotel, Wallace, Idaho.

Name of Surety: G. R. McGill, Route No. 1, Boise, Idaho.

Name of Surety: Casilda Legueniche, 1515 Franklin, Boise, Idaho.

Signed and acknowledged before me this 20th day of June, 1952.

/s/ ED. M. BRYAN

Approved as to Sureties: /s/ Ed. M. Bryan, Clerk.

[Endorsed]: Filed June 20, 1952.

[Title of District Court and Cause.]

DOCKET ENTRIES

1951

Nov. 8—File Indictment.

Nov. 8—Issue Warrant.

Nov. 17—File Warrant—Defendant arrested.

1952

Apr. 1—File Motion to Dismiss Indictment.

Apr. 1—Arraigned—pled not guilty as to Counts 1 and 2.

Apr. 1—Trial set for 10 a.m., Apr. 22, 1952, bond continued.

Apr. 1—File Notice of Motion for Bill of Particulars.

Apr. 2—File Notice of Amended and Supplemental Motion for Bill of Particulars.

Apr. 2—Order for Bill of Particulars.

Apr. 3—File Bill of Particulars.

1952

Apr. 4—File Motion for Continuance.
Apr. 4—File Affidavit of Harold S. Purdy.
Apr. 4—File Affidavit of J. F. Emigh.
Apr. 4—Order Overruling Motion for Continuance.
Apr. 22—File Amended Bill of Particulars.
Apr. 22—Record of Jury Trial.
Apr. 23—Record of July Trial.
Apr. 24—Record of Jury Trial.
Apr. 25—Record of Jury Trial.
Apr. 28—Record of July Trial.
Apr. 28—File Motion for Judgment for Acquittal at close of Plff's Case.
Apr. 29—Record of Jury Trial.
Apr. 29—File Plaintiff's Requested Instructions.
Apr. 29—File Defendant's Requested Instructions.
Apr. 30—Record of July Trial.
Apr. 30—File Motion for Judgment of Acquittal at close of all testimony.
May 1—Record of Jury Trial.
May 1—File Verdict—Guilty on both counts.
May 1—Record of Sentence.
May 1—File Judgment—$7,500 fine and 1 year and 6 months on count 1; $7,500 fine and 1 year and 6 months on count 2; imprisonment on count 2 consecutive to count 1. After service on count 1 deft. probated for 2 years. (Imprisonment on fine) (Deft. to pay income tax due government.)
May 1—Issue Commitment.
May 2—File Order Staying imprisonment to July 1, 1952.

1952

May 12—File Notice of Appeal.

May 12—(Copy to U. S. Attorney.)

June 17—File Order Extending Time for Appeal to August 5, 1952.

June 20—Order Fixing Bond of Defendant at $10,000.

June 20—File Bond—$10,000.00.

July 24—File Designation of Record on Appeal.

July 24—File Affidavit of Service.

July 24—File Order Extending Time for Appeal.

July 24—(Copies to U. S. Court of Appeals, U. S. District Attorney, J. F. Emigh and Harold S. Purdy.

July 25—File Transcript of Testimony.

[Title of District Court and Cause.]

ORDER

Good cause appearing therefor,

It is Ordered that the time within which the record on appeal may be filed and the appeal docketed in the United States Circuit Court of Appeals for the Ninth Circuit, and the same is extended to August 5, 1952.

Dated: June 17, 1952.

/s/ CHASE A. CLARK,
District Judge for the District of Idaho

[Endorsed]: Filed June 17, 1952.

[Title of District Court and Cause.]

ORDER

Good cause appearing therefor,

It Is Ordered That the time within which the record on appeal may be filed and the appeal docketed in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is extended to August 15, 1952.

Dated at Boise, Idaho, this 24th day of July, 1952.

/s/ CHASE A. CLARK,
United States District Judge

[Endorsed]: Filed July 24, 1952.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP), to-wit:

1. Indictment.
2. Motion to Dismiss Indictment.
3. Notice of Motion for Bill of Particulars.
4. Notice of Amended and Supplemental Motion for Bill of Particulars.

5. Order for Bill of Particulars (Minute Entry of April 2, 1952).

6. Bill of Particulars.

7. Motion for Continuance.

8. Affidavit of Harold S. Purdy.

9. Affidavit of J. F. Emigh.

10. Order overruling Motion for continuance (Minute Entry of April 4, 1952).

11. Amended Bill of Particulars.

12. Motion for Judgment for Acquittal at close of Plaintiff's Case.

13. Defendant's Request for Instructions.

14. Motion for Judgment of Acquittal at close of all Testimony.

15. Verdict.

16. Judgment.

17. Order Staying Execution of Sentence.

18. Notice of Appeal.

19. Bond in the sum of $10,000, pending determination of appeal.

20. Reporter's Transcript of Testimony.

21. Original Exhibits Nos. 1 to 28 inclusive, 30 to 55 inclusive, and 56, 57 and 58.

22. List of docket entries.

23. Orders (2) extending time to file Transcript on Appeal in the Appellate Court.

24. Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, this 7th day of August, 1952.

[Seal] /s/ ED. M. BRYAN, Clerk

In the United States District Court for the District of Idaho, Northern Division

No. 4412

UNITED STATES OF AMERICA, Plaintiff,

vs.

AUSTIN F. McFEE, Defendant.

TRANSCRIPT

This matter came on for trial before the Honorable Chase A. Clark, United States District Judge, sitting with a jury at Coeur d'Alene, Idaho, on April 22, 1952.

Appearances: John A. Carver, Esq., United States District Attorney, Boise, Idaho, Herman Rossi, Esq., Asst. U. S. District Attorney, Boise, Idaho, W. W. Patten, Esq., Spec. Asst. U. S. District Attorney, Seattle, Wash., Dudley L. Wilson, Esq., Spec. Asst. U. S. District Attorney, Spokane, Wash., Attorneys for the Plaintiff. J. F. Emigh, Esq., Butte, Montana, Harold S. Purdy, Esq., Coeur d' Alene, Idaho, James P. Keane, Esq., Wallace, Idaho, Attorneys for the Defendant.

G. C. Vaughan, Reporter, Boise, Idaho. [1*]

April 22, 1952, 10:00 o'clock a.m.

(Examination of jury reported but not transcribed.)

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* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

After the jury was selected and duly sworn the following proceedings were had.

(The Court admonished the jury and a recess was taken until 10:00 o'clock.)

10:00 o'colck, April 24, 1952

(Opening statement by Mr. Patten.)

(It was stipulated between counsel that the original exhibits may be withdrawn and copies or photostats substituted in place of originals.)

JOHN S. PETERSON

Called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Patten): What is your address?

A. Boise, Idaho.

Q. Will you give us your full address?

Mr. Emigh: Let the record show that the defendant objects to the introduction of any evidence on the ground and for the reason that count one of the indictment does not state facts sufficient to constitute a crime or a public offense; particularly the offense charged in count one.

And also makes the same objection as to the introduction of evidence concerning count two on the ground that count two of the indictment does not state facts sufficient to constitute a crime or public offense particularly the offense charged.

The Court: Do you wish to be heard on this?

Mr. Emigh: No, Your Honor.

(Testimony of John S. Peterson.)

The Court: I will hear you anyway, what have you to say?

Mr. Emigh: I only wish to state for the record that as a matter of law the defendant cannot waive the question whether or not the indictment states a public offense.

The Court: In other words you have something in the back of your mind that something is wrong with the indictment and you do not want to tell the Court about it at this time.

Mr. Emigh: I will say that it is my belief as an attorney that this indictment is sufficient under the rules as laid down by the Circuit Court of Appeals of the United States at the present time.

The Court: Then you have nothing to say at this time.

Mr. Emigh: I have not, there are no mental reservations [2] on my part but I do feel that it is my duty to preserve the record because I think that the question raised cannot be waived and I do not want to be placed in the position of not protecting my client's rights.

The Court: And your thought is that you should object to everything whether you have a ground for your objection or not.

Mr. Emigh: No, Your Honor, that is not my purpose but I do feel that the record should be protected on this matter.

The Court: You have now made one objection and you say that you think it is not a good objection.

(Testimony of John S. Peterson.)

Mr. Emigh: But I do say that it is something that cannot be waived.

The Court: Then why make the objection when you say that under the decisions of our higher court it is a good indictment?

Mr. Emigh: I just want to be sure as attorney for my client that I have protected the record.

The Court: It seems that you just want to object.

Mr. Emigh: That is not the case, Your Honor.

(The foregoing remarks of court and counsel were made after the jury was excused.)

The Court: You may recall the jury, Mr. Bailiff.

(The following in the presence of the jury.)

The Court: I think I probably should tell you ladies and gentlemen of the jury that during the course of this trial it will be necessary for you to be excused when matters of law are presented to the Court but that is one way you will get a little exercise.

Q. Will you now give us your full address?

A. 321 Eiden St., Boise, Idaho.

Q. What is your position or occupation?

A. I am the assistant chief field deputy of the Internal Revenue Service of Idaho.

Q. How long have you been employed by the Collector of Internal Revenue in the collection district of Idaho?

A. A little over 18½ years.

Q. And where is the collector's office located?

A. Boise, Idaho.

Q. How long has it been in Boise?

(Testimony of John S. Peterson.)

A. Since 1919.

Q. Mr. Peterson, we have asked you to bring certain documents from the collector's office; will you give them to bailiff? A. Yes, sir.

Mr. Patten: I would like these to be marked, this first as plaintiff's Exhibit No. 1 for identification.

Mr. Patten: Your Honor, while counsel is examining that exhibit I might say that it will be necessary to introduce a number of the official records of the Collector's office, they are the original business records and I would like to [4] have a stipulation that we may withdraw the original documents and substitute photostatic copies of those documents.

Mr. Emigh: We have no objection to that.

The Court: Then it may be understood that photostatic copies may be substituted of any of the exhibits where that is desired.

Mr. Patten: I have been informed that some of the copies are not available for examination at this time but will be.

The Court: It may be understood that copies may be introduced at any time.

Q. Mr. Peterson, can you identify that document for the Court and jury? A. I can.

Mr. Emigh: I wonder if this has been offered.

Mr. Patten: Not yet.

The Court: You may go ahead.

A. This is the 1945 individual income tax return, serial no. 9099032 filed in the office of the Collector

(Testimony of John S. Peterson.)

of Internal Revenue for the District of Idaho in the name of A. F. McFee.

Q. Can you tell us when it was returned?

A. March 11, 1946.

Mr. Patten: I will not offer it in evidence at this time. I will ask that this be marked as plaintiff's Exhibit No. 2. [5]

Q. Now, will you identify the document which has been handed to you?

A. This is the individual income tax return for the calendar year of 1946: Serial No. 304053 filed in the office of the Collector of Internal Revenue for the District of Idaho. It is in the name of A. F. McFee.

Q. And when was that return filed?

A. March 15, 1947.

Mr. Emigh: May I examine the witness on this for a moment?

The Court: Yes, you may.

Q. (By Mr. Emigh): This exhibit is not in the condition that it was at the time it was received, is it Mr. Peterson?

A. So far as I know, it is.

Q. To your knowledge were these red markings on there when this exhibit was received or were they placed on there by some member of the Department?

A. They were placed on there by some member of our department.

Q. I was referring to the first page?

A. Yes, sir.

(Testimony of John S. Peterson.)

Q. That would not be true of the red markings on the second page?

A. I would say that they were on there when the return was filed. [6]

Q. And that is true of the markings on the third page, they were placed on there by your department? A. These check marks were.

Mr. Emigh: I think unless these markings are deleted that have been placed there by the Department that we object to this exhibit, I will ask another question.

Q. Were these blue markings put on there by your department? A. I believe so.

Mr. Emigh: I will object to that.

The Court: ——There is nothing before the Court at this time.

Mr. Emigh: Let the record show that the objection now being made is to the introduction of this exhibit unless the markings placed on there by members of the Internal Revenue Department are deleted.

The Court: I will not rule on that objection at this time as I don't believe there is any offer and there is nothing before the Court.

Q. (By Mr. Patten): What was the first year that Mr. McFee filed a return with your office, do you know? A. Yes, sir.

Q. What year was that? A. 1936.

Q. And for what years between that and 1945 did he file returns? [7]

(Testimony of John S. Peterson.)

A. He filed for each and every year from 1936 to 1945.

Mr. Patten: I will ask that this group of three documents be marked for identfification as Exhibit No. 3.

The Court: If you want them marked separately as 3, 4 and 5 you may go on with your examination.

Mr. Patten: Then with the understanding that they are so marked, I will examine if it is agreeable with your Honor.

The Court: They will be marked by the Clerk, you may go ahead.

Q. In reference to Exhibit No. 3 I will ask you if that exhibit ——

The Court: I will ask you to refrain from making the objection until the exhibits are offered in evidence after they have been identified and you may cross-examine before making the objection as to any particular exhibit.

Mr. Patten: The Government will concede, if the Court please, that there is nothing before the Court at this time.

The Court: Let's go on with the examination.

Q. Mr. Peterson will you identify the first document which has been handed you now and marked as Exhibit No. 3?

A. This is the income tax return for the calendar year of 1942; Serial No. 42232; filed in the office of the Collector of Internal Revenue for the District of Idaho [8] in the name of A. F. McFee.

(Testimony of John S. Peterson.)

Q. And will you identify plaintiff's Exhibit No. 4 marked for identification?

A. Exhibit No. 4 is the individual income tax return for the calendar year of 1943; Serial No. 902500; that is filed in the office of the Collector of Internal Revenue for the District of Idaho in the name of A. F. McFee.

Q. Now go ahead and identify Exhibit No. 5.

A. Exhibit No. 5 is an individual income tax return for the calendar year of 1944; Serial No. 908557; filed in the office of the Collector of Internal Revenue for the District of Idaho in the name of A. F. McFee.

Q. Mr. Peterson, we requested you to bring Mr. McFee's returns for the years 1936 to 1941, do you have those with you? A. No, sir.

A. And where are those?

A. They are destroyed.

Q. Why were they destroyed?

A. That was under orders of the Commissioner of Internal Revenue at Washington, D. C.

Q. Will you explain that to the jury.

Mr. Emigh: May we object to this as not proper examination to determine anything upon which the Government can establish the corpus delicti.

The Court: The objection is overruled. [9]

Q. You may go ahead with the answer.

A. That was destroyed under orders of the Commissioner of Internal Revenue at Washington, D. C. under an act of Congress dated July 7, 1943 wherein authority was given to the Commissioner

(Testimony of John S. Peterson.)

of Internal Revenue to destroy certain income tax returns, particularly those over six years old or had been in the files of the Commissioner or the various Collectors throughout the country for a period of over six years and under that authority the Commissioner of Internal Revenue ordered the Collectors for Idaho to destroy the returns which you referred to here and which I did not bring with me.

Mr. Patten: I will ask now that the next document be identified as Exhibit No. 6.

The Court: Just hand it to the witness.

Q. Will you identify that document?

A. That is a partnership income tax return for the calendar year 1942; the Serial No. is 972642. It is filed in the office of the Collector of Internal Revenue for the District of Idaho in the name of North Idaho Sales Co.

Q. You say that is a partnership return?

A. Yes, sir.

Q. Now, Mr. Peterson will you identify what has been handed to you and marked as plaintiff's Exhibit No. 7 for identification?

A. Yes, this is marked as defendant's Exhibit No. 7. [10]

Mr. Patten: I beg your pardon, now, it is marked as Plaintiff's Exhibit No. 7.

A. This exhibit is a partnership income tax return for the calendar year 1943, Serial No. 970797 and it is filed in the office of the Collector of In-

(Testimony of John S. Peterson.)

ternal Revenue for the District of Idaho, in the name of North Idaho Sales Co.

Q. We requested you to bring the returns from the Collector's office filed either in the name of North Idaho Sales Co. or— May I withdraw that please?

Q. What was the first year that the partnership, composed of A. F. McFee and Dorothy McFee, doing business as North Idaho Sales Co. filed a return with the Internal Tax Revenue at Boise?

A. That was in 1936.

Q. And for what year was that?

A. Under the name of A. F. and Dorothy McFee, this partnership filed returns for 1936 through 1940 each and every year.

Q. Do you have those returns with you?

A. I do not.

Q. Will you tell the jury why you don't have those returns?

Mr. Emigh: We make the same objection, that it is incompetent, irrelevant and immaterial at this time, and it is improper examination, it is nothing upon which the corpus delicti can be determined.

The Court: The same ruling, he may answer.

A. Because they have been destroyed under the authority of the [11] same order that I mentioned, of the Commissioner of Internal Revenue.

Mr. Patten: I ask that this exhibit be marked as plaintiff's Exhibit No. 8 for identification.

Q. Will you tell the jury what the document

(Testimony of John S. Peterson.)

is that you have in your hand at this time which is marked as No. 8?

A. Exhibit No. 8 is a partnership income return, income tax return for the calendar year 1945, the Serial No. is 873126; it is filed in the office of Collector of Internal Revenue for the District of Idaho in the name of Dan-MacLease.

Mr. Patten: I ask that this next document be marked as Exhibit No. 9.

Q. Will you identify that Mr. Peterson?

A. Exhibit No. 9 is a partnership income tax return for the calendar year 1946, Serial No. 883226, filed in the office of the Collector of Internal Revenue for the District of Idaho in the name of Dan-MacLease.

Q. Mr. Peterson can you tell us the total amount that Mr. A. F. McFee and Dorothy McFee paid into the Collector's office in the years 1936 to 1941?

Mr. Emigh: We object to that as the proper foundation has not been laid and we object until such foundation is laid showing what this witness purports to base his conclusion on. Until such time affirmatively shown that he has knowledge [12] of the things that he is requested to give a conclusion on, the proper foundation is not laid here and it is incompetent, irrelevant and immaterial, it is secondary evidence.

The Court: Yes, I think this should be shown from the records.

Q. Mr. Peterson you have records of the pay-

(Testimony of John S. Peterson.)

ments made in the name of A. F. McFee and Dorothy McFee for the years 1936 to 1941?

A. I do.

Q. Will you consult that record?

A. Yes, sir.

Q. Is this an official record from the office of the Collector of Internal Revenue for the District of Idaho?

A. It is an official transcript of the payments made by those individuals for those years, and certified by the Collector before I left Boise to come to Coeur D' Alene to attend this trial I compared this with the original in the office of the Collector of Internal Revenue and I compared them so that I know that the figures in this transcript are the same as shown by the official record and the original record.

Mr. Emigh: We object, and it is on the same ground, that the proper foundation is not laid as to who prepared the record and what this was prepared from and the knowledge of the person certifying this document and that it was prepared from the tax returns, that is that the original record was [13] prepared from the original income tax returns which I now claimed to be destroyed so that he can say that they are from the returns.

Mr. Patten: The supporting records of the payments made are kept in the office.

Mr. Emigh: Do you expect to connect this up?

Mr. Patten: I am offering this to show what hap-

(Testimony of John S. Peterson.)

pened to the income tax Mr. McFee claimed that he paid.

Mr. Emigh: We object to this, your Honor, the bill of particulars filed in this case states that this evidence will be based on the income tax returns and not on payment books, and we object on the ground that the Government is limited by the bill of particulars, we object to this on the ground that the evidence is beyond the bill of particulars here.

The Court: It will be admitted only insofar as it supports the bill of particulars.

Mr. Emigh: We have the further objection that they are not in evidence, I am calling the Court's attention to the fact that none of the exhibits are admitted in evidence at this time. We have a stipulation that copies may be substituted but we think that the exhibits should be admitted in evidence if they are to be testified from in this case.

Mr. Patten: May I have this marked as plaintiff's [14] exhibit?

The Court: Yes, the Clerk will mark it.

A. There are two separate certificates here, in fact there are three of them.

Q. Would you identify Exhibit No. 11.

A. Plaintiff's Exhibit No. 11——

Q. Just a moment, may I start with No. 10, will you identify Exhibit No. 10?

A. Plaintiff's Exhibit No. 10 is a certificate of assessments and payments of income taxes by A. F. McFee for the years 1942, '43, '44, '45, '46 and '47.

Q. By whom is that record signed?

(Testimony of John S. Peterson.)

A. By John R. Viley, Collector of Internal Revenue for the District of Idaho.

Mr. Patten: I offer the exhibit in evidence at this time.

Mr. Emigh: May we examine this exhibit?

The Court: Yes you may.

Mr. Emigh: I think we still object on the same ground and the same reasons. I object for the reason that it is not based upon the income tax returns reported and they are not reported to be lost or anything of that sort, it is apparently a statement of payments and not of taxes due or reported and does not take the place of the exhibits which have not been introduced and it is not only secondary evidence, [15] but it is not the official records and it is incompetent, irrelevant and immaterial and there is no proper foundation laid for any such evidence.

The Court: It may be admitted with the understanding that where the original, if it has not been destroyed under the order heretofore mentioned, that the original will be introduced, and if not, then it will be stricken.

Mr. Patten: We are not offering that as evidence of the amount which was reported on the McFee returns or what was in the returns, this is the collector's record of the money that he received from McFee and has nothing to do with the contents of those returns.

The Court: I have admitted it with the understanding that where ever there are original records they will be introduced.

(Testimony of John S. Peterson.)

Mr. Patten: I am sorry, I missed that ruling.

The Court: I will expect you to follow this up with the originals, I realize of course that all of this cannot be put in at once.

Mr. Patten: I will endeavor to follow your Honor's ruling.

Q. Will you identify Exhibit No. 11.

A. Plaintiff's Exhibit No. 11 is a certificate of assessments and payments, certified to by John R. Viley, Collector of Internal Revenue for the District of Idaho, showing the assessments made against A. F. McFee and the payments [16] made by him for the years 1936 through 1941.

Mr. Patten: We offer Exhibit No. 11 in evidence.

Mr. Emigh: May the same objection be made to this as was made to Exhibit 10 and the further objection that it goes beyond the bill of particulars as to the mode of proof.

The Court: Is this a part of the records and files in your office?

A. Yes they are.

The Court: It may be admitted.

Q. Now, Mr. Peterson, will you identify Exhibit No. 12?

A. Exhibit No. 12 is a certificate of assessment and payment by Dorothy McFee certified to by John R. Viley, Collector of Internal Revenue for the District of Idaho for the years 1936 through 1943.

Mr. Patten: I am not going to offer that in evidence at this time. You may cross-examine.

(Testimony of John S. Peterson.)

Cross-Examination

Q. (By Mr. Emigh): You stated that no income tax return was filed by Mr. McFee prior to 1933?

A. No, I didn't say that.

Q. Then what was your statement?

A. I think I said that he filed income tax returns for each and [17] every year from 1936 to 1946 or through 1945.

Q. Just preceeding that didn't you make the statement that he had not filed a tax return prior to 1936?

A. I think I said that 1936 was the first year he filed.

Q. You didn't imply that there was none filed prior to that time?

A. In the District of Idaho, he may have filed someplace else, he could have done that alright.

Q. You didn't say that; do you now say that you don't know whether he filed in some other place?

A. So far as Idaho is concerned the first return was filed in 1936.

Q. But you do not know whether he filed some other place prior to 1936?

A. That is correct, I do not know.

Q. Can you say that he didn't in 1924 file a report in Idaho?

A. I don't have any knowledge of that.

Q. You haven't checked prior to 1936?

A. We have in the District of Idaho.

(Testimony of John S. Peterson.)

Q. That is what I am saying, in Idaho.

A. The records show that the first return filed in the District of Idaho was in 1936, that is by McFee.

Mr. Emigh: I believe that is all.

Mr. Patten: You may be excused, Mr. Peterson.

The Court: At this time we will recess until 1:45. [18].

1:45 o'clock p.m., April 23, 1952

WILFORD J. EMASIO

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you state your full name? A. Wilford John Emasio.

Q. And now will you give your address?

A. 816 Maple, Wallace, Idaho.

Q. And your occupation?

A. At the present time I am manager of the Whitten Mineral Co. and Secretary-Treasurer of the Lucky Friday Mining Co. of Wallace, Idaho, and I do a little private accountancy on the side.

Q. How long have you been engaged in the accounting work?

A. Well possibly since 1925 or '26.

Q. During all of that time where were you located? A. At Wallace, Idaho.

(Testimony of Wilford J. Emasio.)

Q. Do you prepare income tax returns in connection with your accounting work?

A. Yes, sir. [19]

Q. Do you know the defendant in this proceeding, Mr. A. F. McFee? A. Yes, sir, I do.

Q. I hand you this document, and I will ask you if you recognize plaintiff's Exhibit No. 1?

A. Yes, sir.

Q. Is that your signature on the first page?

A. Yes, sir, it is.

Q. Are you familiar with that?

A. Yes, sir.

Q. I mean the other signature on that page?

A. Yes, sir.

Q. You say you are familiar with it?

A. Yes sir.

Q. Whose signature is that?

A. Mr. A. F. McFee.

Q. Did you see Mr. McFee sign that return?

A. Yes, sir.

Q. That is his return? A. Yes, sir.

Q. Did you prepare that? A. Yes, sir.

Mr. Patten: I offer this in evidence now as plaintiff's Exhibit 1.

The Court: And that A. F. McFee, whose signature is on the first page as you testified, he is the same McFee as the defendant here? [20]

A. Yes, sir, it is.

Mr. Purdy: We have no objection to the offer.

The Court: It may be admitted.

Q. Mr. Emasio, will you examine Exhibit No.

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(Testimony of Wilford J. Emasio.)

2 now and tell the jury if you know what it is, do you recognize that document?

A. Yes, sir.

Q. Did you prepare it? A. Yes, sir.

Q. And is your signature on the first page?

A. Yes, sir.

Q. Is there another signature on that page?

A. Yes, sir.

Q. Are you familiar with the second signature on the first page? A. Yes, sir.

Q. Whose signature is that?

A. A. F. McFee.

Q. And is that the defendant in this proceeding, the gentleman who is sitting here (indicating)?

A. Yes, sir.

Q. Did you see him sign that return?

A. Yes, sir.

Mr. Patten: We offer this as Exhibit No. 2.

Mr. Purdy: We have no objection.

The Court: It may be admitted.

Q. Mr. Emasio you have been handed exhibits Nos. 3, 4, and 5, will you please examine plaintiff's Exhibit No. 3 and tell [21] the jury if you also prepared that return? A. Yes, sir.

Q. And does that also bear the signature of Mr. McFee? A. Yes, sir.

Q. Now would you please examine plaintiff's Exhibit No. 4 and tell us the same about that, that is, if it is true?

A. Yes, the same is true about this, I signed as a witness to the signature of Mr. A. F. McFee.

(Testimony of Wilford J. Emasio.)

Q. Now then will you examine Exhibit No. 5 and tell us about that?

A. The same is true, I signed that as a witness to Mr. McFee's signature.

Q. That is your signature on the instrument?

A. Yes, sir.

Q. And the other is the signature of Mr. A. F. McFee, the defendant here? A. Yes, sir.

Mr. Patten: I don't propose to burden the record with all of these exhibits at this time, they will be available to be used by the agents in their computation here later.

Upon reconsideration of that, I would like to move the admission of these exhibits, 3, 4, and 5.

Mr. Purdy: We have no objection.

The Court: They may be admitted.

Q. Now, Mr. Emasio, you have been handed Exhibit No. 1 again. Will you tell the Court and jury the sources of the income [22] reported on this return?

Mr. Purdy: I think the return speaks for itself.

Mr. Patten: This man is an expert accountant, I also wish to lay the basis for some further questioning.

The Court: He may answer the question.

Q. Now then, will you enumerate the source of the income listed on the return?

A. How do you mean, make a direct question and I will answer.

Q. The first figure which appears is item number three on the return.

A. Yes, $2,674.93.

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(Testimony of Wilford J. Emasio.)

Q. And what is that?

A. I will have to dig through them to see.

Q. On the form what is that?

A. That is dividends and interest.

Mr. Purdy: May we have the objection to this line of testimony, that is, the exhibit speaks for itself.

The Court: I was wondering if it would save time to read the exhibit to the jury.

Mr. Patten: My primary purpose is to ascertain where the witness obtained the figures that he put in the return.

Q. Would you read the item, the figure you used?

A. The total amount of dividends and interest, the total, $2,674.93.

Q. Where did you obtain that? [23]

A. From the bank deposit records, from funds put in the First National Bank of Wallace, Idaho, from the books set up or the duplicate deposit slips attached to the deposit book.

Q. And this figure reflects the dividends and interest deposited in the First National Bank of Wallace, Idaho? A. Yes, sir.

Q. Now would you turn to page 2, schedule B and read that item and amount.

A. Buildings.

Q. In the second column?

A. You mean here at the end?

Q. I mean the amount of rents.

A. $5,005.00.

(Testimony of Wilford J. Emasio.)

Q. Where did you obtain that figure?

A. From the same source as the other.

Q. That is the funds in the First National Bank of Wallace, Idaho? A. Yes, sir, the same.

Q. And this reflects the amount of rent deposited in the Bank account? A. Yes, sir.

Q. Under schedule C read the total receipts.

A. The North Sales Co. $248,103.34.

Q. Where did you obtain that figure?

A. From the cash book that was furnished from the North Idaho [24] Sales Co. Office.

Q. Did you prepare the books for the North Idaho Sales Co. for the year 1945?

A. No, I told you that I got these receipts from the books furnished by their office.

Q. And who furnished you with those books?

A. I don't know who it was at that time, but it was furnished from a book there.

Q. You did keep certain records of the North Idaho Sales Co. during the year 1945?

A. You confuse me, I don't know what you mean.

Q. Did you keep a ledger of the North Idaho Sales Co.? A. Yes, sir, a general ledger.

Q. From your knowledge of the North Idaho Sales Co. operations do you know what were the original records from which the book was prepared from which you got this information?

A. It was furnished out of the North Idaho Sales Company's office by their employees and dis-

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(Testimony of Wilford J. Emasio.)

tributed and totalled up and I ran them in the general ledger.

Q. And do you know from what the figure was compiled?

A. Receipts from phonograph, from slot machines, and sales of machines.

Q. And this was a summary figure?

A. Yes, sir.

Q. How often did you receive that from North Idaho Sales Co.? [25]

A. Once a month.

Q. Do you know what the basis was that the employee of the North Idaho Sales Company compiled her figures from that she gave you?

A. From the collections made by the outside men.

Q. And will this figure reconcile with any other records?

A. With the bank deposits, yes sir.

Q. And do you know if the figure which the employee of the North Idaho Sales Co. gave you was compiled from the bank deposits? A. Yes, sir.

Q. The figure which you use here reconciles with the bank deposits?

A. Yes, sir, of the North Idaho Sales Co.

Q. What were these bank deposits, where were they carried?

A. Two banks, this figure that you are asking about now.

Q. Just the North Idaho Sales Co.?

(Testimony of Wilford J. Emasio.)

A. A portion in Coeur d' Alene, Wallace and Lewiston.

Q. Where was the account carried in Wallace?

A. In the Idaho First National.

Q. And where was it carried in Coeur d' Alene?

A. The Idaho First National.

Q. And in Lewiston?

A. In two banks there, the First Security and the Idaho First National.

Q. Did they have accounts in both banks? [26]

A. At one time in the First Security and the second time I think it was the Idaho First National.

Q. Now will you turn to the schedule gains and losses, schedule D, this document shows $16,818.76, it reflects $16,818.76, reflects capital gain of that amount, will you explain where you obtained those figures?

A. The sales of pin balls and slots. I don't know whether I should go into the depreciation on the different lines, some were sold and then some were purchases, from 1937 to 1943, the pin balls and slots, and a 1936 Ford coupe——

Q. Where did you get the sales figures?

A. From the office of the North Idaho Sales Co.

Q. Are those from the books of the North Idaho Sales Co.? A. Yes, sir.

Q. Were there any other records?

A. An audit of the Gem Club of Athol, Idaho and another item on there is machines destroyed or stolen.

(Testimony of Wilford J. Emasio.)

Q. If you were checking the books there, is it your statement now that you obtained these statements or figures from the books of the North Idaho Sales Co.? A. That is right.

Q. And what were those books posted or prepared from? A. From the actual sales.

Q. Where did the money go from the sales?

A. In the Idaho First National Bank of Wallace, Idaho.

Q. Would you turn to the profit and loss statement covering [27] the Gem Club?

A. Yes, I have it.

Q. Did you prepare this profit and loss statement? A. Yes, sir.

Q. Would you explain to the jury where you obtained the receipts figures? A. Yes, sir.

Q. Read it and explain where you obtained it?

A. Sales $6,307.78; slots $1,373.75; phonographs receipts $50.40, a total of $7,731.95.

Q. Where did you obtain that figure?

A. I think the manager of the club furnished it, he furnished the daily report receipts which was sent to the Coeur d' Alene office of the North Idaho Sales Co. and from that point the North Idaho Sales Co. lifted this out of the cash book.

Q. And was there any record with which this cash book could be reconciled? A. Yes, sir.

Q. Now will you give us the same information with respect to the Foresters Club in Lewiston, the receipts?

A. Yes. Sales $59,973.49; slots $14,670.47; cigar-

(Testimony of Wilford J. Emasio.)

ette machine $1,237.37; phonograph $1,986.79, making a total of $77,868.12.

Q. And where did you obtain that figure?

A. From the daily reports furnished from Lewiston to the North Idaho Sales Co. office at Coeur d' Alene. [28]

Q. And those could be reconciled?

A. Yes, sir.

Q. With what?

A. With the Idaho First National at Lewiston and Coeur d' Alene or it could be either, they could be reconciled with either bank.

Q. Now will you turn to the same with respect to the Foresters Club at Coeur d' Alene, Idaho.

A. Is this the original return, I got one here that I can not read.

Q. Maybe that I can help with this.

A. Yes, sales $19,161.28; slot machines $3,875.22; phonograph receipts $234.20 makes a total of $23,270.70.

Q. Where did you obtain those figures?

A. From the cash book furnished by the North Idaho Sales office out of Coeur d' Alene.

Q. And with records could that cash book be reconciled? A. With the bank record.

Q. Without going into each of these in detail, each of these earnings statements show a considerable amount of expenses in operating the business.

A. Yes, sir.

Q. Would you tell the court and jury where

(Testimony of Wilford J. Emasio.)

you obtained those figures, the expense figures of this business?

A. From the check book furnished from the same source that I got the income from. [29]

Q. And did you make a check of the spread from the original books?

A. No, these club girls would distribute it.

Q. From checks? A. Yes, sir.

Q. Did you keep an over-all record of this business? A. Yes, sir.

Q. And is this return in agreement with those records that you kept? A. Yes, sir.

Q. Are those records in agreement with the bank account? A. Yes, sir.

Q. What record was made of the amount of money that Mr. McFee withdrew out of this business, what amounts of money, if any, that he withdrew?

A. We charged him on his personal drawing account.

Q. That was part of the records of the North Idaho Sales Co.? A. Not necessarily.

Q. Was it a part of the records of those clubs?

A. He drew from the club and he was charged on the club books; it was no part of the North Idaho Sales Co.

Q. Mr. McFee had drawing accounts at several of those clubs? A. Yes, sir.

Q. Do you recall the clubs where he had drawing accounts?

A. At Athol, Coeur d' Alene and Lewiston.

(Testimony of Wilford J. Emasio.)

Q. And the North Idaho Sales Co.? [30]

A. Yes, sir.

Q. What other records were made of the amounts that Mr. McFee withdrew from the business? A. Meaning what?

Q. How was his drawing account posted?

A. Charged to him personally.

Q From what records was this records posted?

A. The withdrawals from any of those clubs or from the North Idaho Sales.

Q. What pieces of paper would the bookkeeper have in front of her to charge Mr. McFee's account?

A. Cash withdrawals and check withdrawals.

Q. And whether it was check or cash it would be charged to his account? A. Yes, sir.

Q. And you have stated that the books balanced? A. Yes, sir, they had to.

Q. Did they reconcile with this return?

A. Yes, sir.

Q. Is there any way in which Mr. McFee could have withdrawn funds from the business as recorded in those books without those withdrawals being recorded in his drawing account?

Mr. Purdy: We object to that as calling for a conclusion of the witness.

The Court: This is an expert, I think that I will [31] permit him to answer.

A. I cannot follow you closely, you mean, you go from one to the other and I don't follow you.

The Court: If you don't understand just state that you don't.

(Testimony of Wilford J. Emasio.)

A. No, I don't know how to answer that.

Q. If Mr. McFee was to draw on one of these banks and not report it in the books, would the books balance?

A. Not if he drew it from the bank account. If he drew it out of the funds, yes, he could make a withdrawal, yes sir.

Q. My question is, from these books as reflected in this business and as shown on the return and the books, could he have withdrawn any funds without being recorded on the drawing account?

A. No.

Q. Mr. Patten: Could we ask for a stipulation that any exhibit that has been admitted can be read to the jury.

The Court: Yes, that is understood, at any time during the argument or during the course of the trial you may read any portion of the exhibit admitted.

Mr. Emigh: I didn't get that.

Mr. Patten: I was asking for a stipulation that any portion of the exhibits may be read at any time.

Mr. Emigh: Yes, we will so stipulate.

The Court: Then it may be understood that any portion of the exhibit admitted may be read at any time during the course of the trial. [32]

Q. You have Exhibit No. 2, willl you read item No. 3 on this exhibit?

A. $2036.42.

Q. What is that?

(Testimony of Wilford J. Emasio.)

A. That is dividends.

Q. Where did you obtain that figure?

A. Deposit slips, duplicate deposit slips, funds deposited in the First National Bank of Wallace, Idaho.

Q. Would you read item 4 that you have?

A. $127.75.

Q. What is that figure?

A. That is interest income.

Q. Where did you obtain that figure?

A. I will have to look, but I would say that it was from the same source.

Q. Will you turn to schedule B and tell the jury where you obtained the figure for the rent that Mr. McFee received during 1946?

A. Duplicate deposit slips of deposits in the First National Bank of Wallace, Idaho.

Q. How much were those?

A. You mean gross or net?

Q. Give us the total, the gross.

A. $5,037.50.

Q. Referring to schedule C would you explain to the jury where you obtained the total receipts figure? [33]

A. The North Idaho Sales Co.

Q. And what was that figure?

A. $315,551.51.

Q. And how did you get that?

A. From the cash book furnished by the North Idaho Sales from the Wallace, Idaho office.

Q. From what was that prepared?

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(Testimony of Wilford J. Emasio.)

A. You mean how was it prepared?

Q. What record would it reconcile with?

A. The deposit slips furnished for receipts, deposited in the Idaho First National at Wallace, Idaho.

Q. Would you turn to the schedule of gains and losses and tell us——

A. ——Which is that?

Q. Schedule D on the long form.

A. Yes, I have that.

Q. Would you read the gain or loss?

A. $1,588.30.

Q. Where did you obtain that figure which goes into that computation, particularly the gross—change that question, please—where did you obtain the gross sales price used in this schedule?

A. From the North Idaho Sales office at Wallace, Idaho.

Q. Now will you turn to the profit and loss statement of the Samuals Hotel and read those figures; would you read the income figure from this statement and explain where you [34] obtained those. A. The income figures?

Q. The gross income. A. $11,341.21.

Q. Where did you obtain that figure?

A. These figures came from Mr. Randall the president of the Hecla Mining Co. and he was a public accountant at that time and he furnished those figures.

(Testimony of Wilford J. Emasio.)

Q. Do you know if those figures could be reconciled with some third party record?

A. Yes I would say so.

Q. With what record could they be reconciled?

A. I imagine with a set of books that were audited and checked by Mr. Randall and a statement furnished by Mr. Randall.

Q. Do you know if the Samuals Hotel had a bank account? A. I kept no record of it.

Q. Now will you turn to the Foresters Club at Lewiston, Idaho, that is, the statement of that club and read the income reported on that statement?

A. Do you want the list?

Q. Yes, if you please.

A. Sales $31,748.60; slot machine $15,923.96; phonographs $1,088.57; cigarette machine $478.35, total income $49,239.48.

Q. Will you tell the jury where you obtained those figures?

A. I think those were furnished by the manager of the club [35] which furnished daily report; it listed that income and the expenditures, wages, telephone, laundry and all, he furnished a daily report every day and those were sent up from Lewiston to the girl in the North Idaho Sales office once a week; from that point she made the distribution, distributed the income and those books were furnished to me, sent to Wallace once a month.

Q. And would those receipt figures reconcile with the deposit to any bank account?

A. Yes, sir.

(Testimony of Wilford J. Emasio.)

Q. What account was that?

A. It could be the Idaho First National or the First Security Bank.

Q. During the year 1946 did you keep Mr. McFee's general ledger? A. Yes, sir.

Q. Now, turn to the last page on this return.

A. What is that?

Q. I think it is page three, yes, read Mr. McFee's reported net income for the year 1946.

A. On page three?

Q. Item 3 I believe.

A. Yes I have it, $39,679.01.

Q. You stated prreviously that you kept Mr. McFee's general ledger for the year 1946?

A. Yes. [36]

Q. Will you tell the jury if the books that you kept would reconcile with this return or do they agree with these returns with the exception of the Samuals Hotel?

A. The North Idaho Sales was one operation, the Foresters Club was another, the club at Athol was another, I kept a general ledger for the three which was reflected on this return, they were separate books and they did not reflect on the North Idaho Sales.

Q. They were separate books or separate ventures, but you kept the general ledger for all of these?

A. Yes, they were not consolidated in any one spot.

(Testimony of Wilford J. Emasio.)

Q. Could all the books that you kept be reconciled to this return? A. Yes, sir.

Q. Could the books and this return and the bank account that you mentioned be reconciled?

A. Yes, sir.

Q. We noticed in the various earning statements a considerable expenses, will you tell the jury how those expenses were paid?

A. In which operation?

Q. Speaking generally of all of them?

A. Well, can you get down to something definite?

The Court: Now Mr. Witness, just listen to the question and if you can't answer them just say so.

A. I cannot answer unless you make it definite.

Q. Very well, then, we will return to the North Idaho Sales account, can you tell me how the expenses listed there were paid? A. By check.

Q. And you got the figure here from those checks? A. Yes, sir.

Q. And was that the same for the other businesses? A. Yes, sir.

Q. What record, if any, would be made of the funds that Mr. McFee withdrew from his ventures as reflected on the books you kept for the year 1946? A. After he withdrew the money?

Q. No, if he withdrew funds during the year 1946 from a business would there be any record of it? A. Yes.

Q. What would that record be?

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(Testimony of Wilford J. Emasio.)

A. A charge to the personal or partnership account.

Q. Would there be any original record in addition to the drawing account?

A. I don't follow you.

Q. What would be the means by which his employee would get the money out of the business?

A. I don't know.

The Court: Can't you tell us that, would he write a check, would he draw a check?

A. Yes, sir. [38]

The Court: That seems a simple question to answer.

Q. You say he would draw a check.

A. Yes, sir.

Q. And would that check be charged to his drawing account? A. Yes, sir.

Q. And if they were not charged to his drawing account what would happen to your books?

A. They would not balance.

Q. Speaking generally you have told the jury where you obtained the receipt figures of the North Idaho Sales Co., did you ever audit the records of the North Idaho Sales to determine if those receipts were correct?

A. No, we audit them only to reconcile them with the bank statement.

Q. Did you examine any other records than the bank statements? A. No, sir.

Q. Do you know if there were any other records besides the bank statements, of the receipts?

(Testimony of Wilford J. Emasio.)

A. It is my recollection that the collectors deposited the money in the bank and gave it to the girl in the office, that is, a copy of the deposit slip and that is where they became receipts.

Q. Did those collectors which you mentioned make a record of the place where they got this money? A. Not to my knowledge.

Q. Did you ever see any record of where this money came from [39] that went into the bank?

A. No, in some cases yes, but generally, no.

Q. You did see the record which the collection men made?

A. I have seen the receipts or some, turned over to John Jones.

Q. Did you see any record which would tell where Mr. McFee's slot machines were located and how much he got from each location?

A. No, sir.

Q. You never saw such a record?

A. No, not in detail, I saw some.

Q. But you never attempted to reconcile the figures of this return or of these returns against such records? A. No.

Mr. Patten: I think you may cross-examine.

Cross-Examination

Q. (By Mr. Emigh): You were McFee's bookkeeper during this period that you have testified to? A. Yes, sir.

Q. And these reports that you have testified about are prepared from his books, kept in con-

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(Testimony of Wilford J. Emasio.)

nection with his business? A. Yes, sir.

Q. And the deposits were checked with the deposit slips where [40] the collector turned the money in?

A. I think that is correct, they were never turned to me; they were turned to the office and from there on I got the cash book once a month.

Q. And you checked those against the slips, the audit slips of the managers.

A. No, sir, I said that they were furnished to me, they were handed to me to check.

Q. You never checked them?

A. He asked if I saw some of them and I said yes.

Q. That was the collectors slips?

A. Yes.

Q. The items of income which are reflected in the 1946 report, do you have that report there?

A. Yes, sir.

Q. The deduction of the mining lease was a substantial amount? A. Yes, sir.

Q. That amounted to something like $39,000.00?

A. It looks more like it is $59,000.00.

Q. Mr. McFee gave you access to those records for the purpose of preparing these reports; in fact you had access to them all of the time except possibly the bank accounts?

A. I think I made the statement that the books were furnished to me at his office and the cash receipts were distributed out and furnished to me once a month.

(Testimony of Wilford J. Emasio.)

Q. Those various things were carried in a general ledger? [41]

A. Yes, sir, posted in a general ledger.

Q. Periodical entries from daily receipts?

A. Monthly receipts were furnished out of his office and put in a cash book and furnished to me once a month.

Q. You made those entries in a general ledger once a month? A. Yes, sir.

Q. From the daily account kept in the office?

A. Yes, sir.

Q. You had access to them whenever necessary to keep the general ledger?

A. No, I worked from the monthly figures given to me once a month.

Q. And that was the cash book?

A. That was prepared for me once a month.

Q. From records furnished to you once a month? A. Yes, sir.

Q. And that was the method of keeping those accounts? A. Yes, sir.

Q. After checking those with the company's bank accounts they all reconciled?

A. They reconciled their own bank accounts out of their own office.

Q. Still it was reflected in the general ledger?

A. Yes, sir.

Q. And reconciled? A. Yes, sir. [42]

Mr. Emigh: That is all.

(Testimony of Wilford J. Emasio.)

Re-Direct Examination

Q. (By Mr. Patten): Would you look at that figure, I made a mistake in my opening statement, on page 3 item 5, net income, will you give that to me? A. $39,179.01.

Mr. Patten: Thank you, that is all.

GEORGE W. ZELLER

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you tell the jury your address? A. Wallace, Idaho.

Q. Will you give it a little more specifically?

A. 221 Cedar Street.

Q. And your business?

A. Vice-President of the First National Bank.

Q. How long have you held that position?

A. Possibly for five or six years. [43]

Q. How long have you been associated with the First National Bank? A. 31 years.

Q. Do you know the defendant in this proceeding, Mr. A. F. McFee? A. Yes, sir.

Q. We have asked you to bring certain documents with you, would you hand those to the Bailiff please? A. Yes, sir.

Mr. Patten: I am having these marked as Exhibit No. 13.

The Court: Very well.

Q. Can you identify that exhibit?

(Testimony of George W. Zeller.)

A. Yes, sir.

Q. Will you tell the jury what it is?

A. It is a bank statement dating from January 1, 1945 to December 31, 1946 inclusive.

Q. Did you mention whose account it was?

A. A. F. McFee's.

Q. As a banker will you tell us what the bank ledger shows?

A. Deposits on each day they are made and also the withdrawals.

Q. And the balance?

A. Yes, it shows the balance.

Q. Is that the same Mr. McFee who is the defendant in this case? A. Yes, sir.

Mr. Patten: I offer Exhibit No. 13 in evidence.

Mr. Purdy: We have no objection.

The Court: It may be admitted.

Q. Did Mr. McFee borrow any funds from your bank in 1945 or 1946? A. He did not.

Mr. Patten: You may cross-examine.

Mr. Emigh: We have no cross-examination.

O. L. JONES

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Where do you reside Mr. Jones? A. 128 King St., Wallace, Idaho.

Q. What is your business? A. Banking.

Q. What bank are you associated with?

A. The Idaho First National Bank of Wallace.

(Testimony of O. L. Jones.)

Q. How long have you been connected with that bank? A. Since 1937.

Q. What is your position with that bank?

A. Manager.

Q Do you know the defendant in this proceeding, Mr. A. F. McFee? [45] A. I do.

Q. How long have you known him?

A. For 25 years.

Q. What transactions has your bank had with Mr. McFee during the years 1945 and 1946?

A. As a depositor and also as a borrower.

Q. Did he have any other transactions with your bank? A. I think not.

Q. Did he purchase any cashiers checks?

A. He might have.

Q. We have asked you to bring certain records of the bank with you, would you hand those to the Bailiff, please? A. Yes, sir.

The Court: At this time I think we will recess for 15 minutes—ladies and gentlemen of the jury you will of course remember at every recess the admonition that I have given you.

3:05 p.m., April 23, 1952

Mr. Patten: I ask that this be marked as Plaintiff's Exhibit No. 14.

Q. Mr. Jones will you tell the jury what the Plaintiff's Exhibit No. 14 is?

A. Exhibit No. 14 shows the savings account of A. F. McFee, [46] care of North Idaho Sales, do you wish the balance on that?

(Testimony of O. L. Jones.)

Q. What does the ledger show?

A. This shows the deposits, withdrawals from July 17, 1945 until April 1, 1952.

Q. Is that the account of the defendant in this proceeding? A. It is.

Mr. Patten: We offer Exhibit No. 14 in evidence at this time.

Mr. Purdy: We have no objection.

The Court: It may be admitted.

Mr. Patten: I ask that these be marked as Exhibit No. 15.

Q. Mr. Jones would you identify the documents that have been handed to you?

A. This is a series of ledger sheets starting with No. A103, A. F. or Dorothy McFee by Helen Knoerr, North Idaho Sales Co. beginning on December 23, 1944 to December 28, 1946. This last one is in the name of A. F. or Dorothy McFee.

Q. Is that the account of the defendant in this proceeding? A. It is.

Mr. Patten: We offer Plaintiff's Exhibit 15 in evidence.

Q. Could you tell us who Dorothy McFee is?

A. She is the daughter of A. F. McFee.

Q. You know her personally do you?

A. Yes, sir. [47]

Q. You know her to be the daughter of the defendant, A. F. McFee? A. Yes, sir, I do.

Q. She is the person mentioned on the account with A. F. McFee? A. Yes, sir.

(Testimony of O. L. Jones.)

Mr. Patten: Now, we make the offer, your Honor.

The Court: Is there any objection to that?

Mr. Purdy: No objection.

The Court: It may be admitted.

Q. Referring to Exhibit No. 15, that is a checking account? A. Yes, sir.

Mr. Patten: We ask that these two documents be marked as Exhibit No. 16.

Q. Would you identify documents which have just been handed to you?

A. Yes they are two liability cards in the name of A. F. McFee, they are numbered 4A and 5A.

Q. What period do they cover?

A. They cover from December 15, 1944 until February 14, 1947.

Q. What is shown on this record?

A. It shows the borrowing and the payments, or debits and credits to the liability card of Mr. McFee.

Q. That is a loan card? A. Yes, sir.

Q. Is that the loan card of Mr. A. F. McFee?

A. Yes, sir, it is. [48]

Mr. Patten: We offer this exhibit in evidence.

Mr. Purdy: No objection.

The Court: It may be admitted.

Q. Mr. Jones, can you tell us by reference to that card how much was loaned to Mr. McFee in 1945?

A. No, I cannot; several of these items are renewals of the original amount borrowed but I can

(Testimony of O. L. Jones.)

tell the amounts and the credits as of that date.

Q. Can you read them to us?

A. Yes, in 1945, June 15, $7,000.00 and a $7,000.00 credit which made the balance remain the same.

Q. I am not an accountant Mr. Jones, would you identify those as loans or payments?

A. No, I cannot do that, but I can tell you this, a loan had been made and it was not paid on the due date so the note was renewed and the balance remained the same; no addition to the debit or the credit.

Q. Very well, will you proceed?

A. On 6-8-1946—no—that is June 18, 1945 a $10,000.00 note was granted.

Q. That was a $10,000.00 loan?

A. Yes, in addition to the balance as shown on August 9, 1945 an additional $10,000.00 and also on that date another $10,000.00 was granted and a $7,000.00 note was also granted but it was a renewal so the balance stayed the same; on September 4, 1945 $2,000.00 was paid reducing [49] the balance by that amount and on October 16, 1945 there was an additional loan of $7,500.00 granted and on October 31, 1945 there was a payment of $389.13 and that is the end of 1945, now do you want me to go with 1946?

Q. Will you give us the total in 1945, how much was loaned and how much was paid on those loans?

A. On March 21, 1945 there was a balance of

(Testimony of O. L. Jones.)

$21,500.00 and on October 31, 1945 there was a total of $51,110.87.

Q. I checked it over and as I have it, and you can tell me, were the loans $37,500.00 with payments of $2,389.13?

A. That is very close, yes.

Q. There were three $10,000.00 loans?

A. Yes, and a $7,500.00 loan.

Q. And payments of $2,000.00 and one other payment of $389.13? A. Yes, sir.

Q. Now then, will you continue with the year 1946, give us the same information from the exhibit?

A. Yes sir, on January 15, 1946 there was a renewal of $7,500.00 and a payment of $7,500.00, on January 29, 1946 there was another renewal of $7,000.00 and on February 1, 1946 there was a payment of $19,610.87 and a renewal of that amount so the balance was the same; on June 5, 1946 there was a $7,000.00 note and a $7,000.00 payment, another renewal; on June 24, 1946 there was a payment of $10,000.00 and a new note of $10,000.00, another renewal; on June 24, 1946 there was an increase of $20,000.00; on July 11, 1946 [50] there was a payment of $229.50 and another renewal on July 27, 1946 of $7,500.00 leaving the balance the same, on July 31, there was a renewal of $7,000.00 and that left the balance the same, on August 6, 1946 there was a payment of $100.00, on August 7, 1946 there was another renewal of $19,610.87, the balance remaining the same. On August 14, 1946 there

(Testimony of O. L. Jones.)

was a payment of $114.00 and on August 19, a payment of $579.00 and $315.50, on September 7, 1946 there was a payment of $75.00 and on September 12, 1946 a payment of $100.00 and on September 14, a payment of $113.50 on October 11, 1946 a pay ment of $113.00, on October 15, a payment of $74.75, on November 15, a payment of—that was November 7, if I said November 15, that payment was $112.50 on November 29, a payment of $74.50 and on November 30, a payment of $3,450.18 and on December 14, a payment of $112.00 and on December 27, a renewal of $10,000.00 and on December 31, a payment of $74.25. That completes the year 1946.

Q. Mr. Jones, am I correct in summarizing, does it show $20,000.00 of new loans?

A. That is approximately so.

Q. And the payments on those loans, did you total those? A. No, I didn't.

Q. Would this help you (handing witness document)? A. Yes it would.

Q. Now, what total payments were made on those loans? [51] A. $5,637.68.

Q. Now, let's return to the year 1945, is it possible that you didn't get all the payments on the loans for that year?

A. Well, starting in January, January 2, 1945 I show payments for the year of $100.00; $500.00, $1,400.00; $100.00; $1,500.00; $100.00; $500.00; $500.00; $1,00.00; $2,500.00; $1,000.00; $1,000.00 and $389.13.

Q. On the amount that you previously stated that this record showed I believe you failed to turn

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(Testimony of O. L. Jones.)

this card over? A. Yes, I guess that is right.

Q. Now would this assist you in telling how much Mr. McFee repaid on those loans in 1945?

A. Yes it would.

Q. Only in 1945? A. Yes.

Q. ——In your previous answer you did not check the other side?

A. That is right, in 1945 I have here $1,400.00; $1,500.00; $1,000.00; $500.00; $1,000.00; $2,500.00; $1,000.00 and $389.13.

Q. And that is a total of what?

A. $9,289.13.

Q. I think Mr. Jones, that total includes a couple of payments in 1944?

A. Yes, that is right, that would be $6,789.13.

Q. And that was the amount Mr. McFee paid on the loans at [52] your bank? A. Yes.

Q. Do you know how he paid those?

A. No, sir, I don't.

Mr. Patten: I ask that this be marked.

Q. The exhibit shows the same information for the year 1946? A. Yes, sir.

Mr. Patten: I ask that this exhibit be marked as Plaintiff's Exhibit No. 17.

Q. Mr. Jones would you tell the court and jury what Plaintiff's Exhibit No. 17 is, each one of the documents, there are two?

A. Yes, I have a cashier's check drawn on the Idaho First National Bank No. 124697 in the amount of $12,500.00 in favor of E. M. Stern, it is dated January 28, 1946.

(Testimony of O. L. Jones.)

Q. Will you read the endorsement on that?

A. Yes, I imagine it is E. M. Stern and it has been guaranteed by a bank endorsement where it was cashed.

Q. What bank did that clear through and where?

A. It looks like the Federal Reserve of Minneapolis and the Federal Reserve of Portland from there it went to,—I imagine it was first deposited with the Dakota National Bank at Fargo, North Dakota, then to the First National of Minneapolis and from there to Portland and then to us.

Q. Where would you say that check was first negotiated or deposited? [53]

A. From the date,—I

Q. I am asking that you give that information from your experience as a banker.

A. From the date that it bears it would be at the Dakota National Bank, Fargo, North Dakota.

Q. Now, then, the second document, will you identify that?

A. Yes, it is a cashier's check on the Idaho First National Bank No. 124701, it is dated February 1, 1946, also to E. M. Stern and in the amount of $3,000.00.

Q. And will you give the endorsement on that?

A. The same endorsement, I think it has the same endorsement but it is rather blurred, I can see the Dakota National Bank of Fargo,—Yes, I think that is correct.

Q. Who purchased those checks at your bank?

A. I will have to see these register sheets.

(Testimony of O. L. Jones.)

Q. Very well.

A. No. 124697 made payable to E. M. Stern was purchased by F. C. Keane.

Q. And what was the amount of that?

A. $12,500.00.

Q. And by whom did you say it was purchased?

A. F. C. Keane.

Q. Do you know Mr. Keane? A. Yes, sir.

Q. What Mr. Keane is that?

A. He is an attorney at Wallace, Idaho. [54]

Q. What is his full name?

A. Well, I cannot give his first name, but his second name is Clayton, Clayton Keane.

Q. And the next check, who purchased that, the check in the amount of $3,000.00?

A. This was made payable to E. M. Stern and was purchased by Mr. F. C. Keane.

Mr. Patten: I shall not offer this in evidence at this time.

The Court: Very well.

Q. You have handed exhibit marked Plaintiff's Exhibit No. 18, two documents, can you identify those?

A. Yes, they are cashier's checks No. 124957, it is drawn on the Idaho First National Bank of Wallace, Idaho, it is payable to Walter T. Murphy, in the amount of $3,000.00; the second document is a cashier's check No. 125175, it is dated July 10, 1946, payable to A. F. McFee or the Idaho First National Bank in the amount of $6,000.00, it is drawn on the Idaho First National Bank of Wal-

(Testimony of O. L. Jones.)

lace, the first check was dated May 3, 1946.

Q. Who purchased those two checks?

A. The $3,000.00 check, No. 124957 dated May 3, 1946, was made payable to W. T. Murphy and purchased by A. F. McFee.

Q. Will you consult your records and tell us who purchased the $6,000.00 check?

A. The $6,000.00 check No. 125175, dated July 30, 1946, was [55] purchased by A. F. McFee.

Q. Is the A. F. McFee listed in your records the defendant in this case?

A. I believe him to be, yes.

Mr. Patten: I offer this in evidence at this time.

Mr. Purdy: We have no objection.

The Court: It may be admitted.

Mr. Patten: I will ask that this be marked as Exhibit No. 19.

Q. Mr. Jones, you have in your hand Plaintiff's Exhibit No. 19, will you tell the jury what it is?

A. It is our cashier's check No. 125406 it is dated November 2, 1946, made payable to A. F. McFee or Ourselves collateral receipt 120484 in the amount of $5,000.00.

Q. Can you tell us who purchased that check?

A. No, I cannot.

Q. What does your record show?

A. Collateral record 120484.

Q. That is all it shows? A. Yes.

Q. Do you know what the collateral record is?

A. I think I do but I don't want to go under oath on that, we looked it up.

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(Testimony of O. L. Jones.)

Q. This matter? A. Yes, I have.

Q. And what is your best recollection on that? [56]

A. May I see that duplicate, I think I have it marked on there.

Yes, I do, this was to secure a loan of Roger W. Greenough.

Q. So the cashier's check was deposited as collateral for a loan to Mr. Greenough? A. Yes.

Q. Did Mr. Greenough purchase this one?

A. I don't know.

Mr. Patten: We won't offer that in evidence at this time, and I will ask that this instrument be marked as Plaintiff's Exhibit No. 20.

Q. You have been handed Plaintiff's Exhibit No. 20, can you identify that for the jury?

A. These are various ledger sheets covering the checking account of the Dan MacLease, the first entry shows February 1, 1945, and the last entry shows February 28, 1947.

Mr. Patten: We won't move that admission at this time.

Q. Do you know anything, personally, about this account? A. No, I don't.

Mr. Patten: I will not offer this in evidence at this time but I will ask that this instrument be marked as Plaintiff's Exhibit No. 21.

Q. Will you tell the jury what those documents are?

A. Yes, they are a series of deposit slips on the Dan MacLease account. The first one being dated

(Testimony of O. L. Jones.)

February 1, 1945, and the last one having no date, but the next to the last one is December 21, 1946. [57]

Q. Do those deposit slips show deposits to the account that was previously handed to you?

A. That is correct.

Q. What is the function of a deposit slip?

A. To convey money or credits to the account, in whatever amount it might be. It could be to a personal account company or lease and this was the Dan MacLease.

Q. Does it describe what the deposit consists of?

A. Not always, sometimes out of town items, sometimes it shows the cash and sometimes the checks.

Q. What does the first deposit slip show?

A. That would show it by A.F.M., I imagine A. F. McFee on it and showing a number there which I take it to be his check number, 10927, usually that is the way the deposit comes in or with the bank numbers.

Q. Now will you turn to the second one and tell us what it shows?

A. It would indicate that it was a check but it is not marked as to what it is.

Q. The amount of the first deposit was what?

A. $1,000.00.

Q. Now then will you turn to the third?

A. Yes, it shows currency in the amount of $2,000.00, the next is currency also in the same amount and the next is currency.

(Testimony of O. L. Jones.)

Q. Will you read the amount?

Mr. Emigh: We will object to this until it has been [58] offered in evidence, now he is telling what is stated on the exhibit without having it offered.

The Court: Yes, I think it better be offered in evidence.

Mr. Patten: I will withdraw the last question and I will come to that later.

Mr. Purdy: Then we will ask your Honor, that the testimony be stricken and the jury instructed to disregard the same.

The Court: The motion is denied.

Mr. Patten: I will ask that this be marked as Plaintiff's Exhibit No. 22.

Q. Mr. Jones, can you identify that, the instrument marked as Plaintiff's Exhibit No. 22?

A. That is a deposit ticket in the name of J. A. Allen, dated 12-31-46.

Mr. Patten: The Government will not offer that in evidence at this time. You may cross examine the witness.

Cross Examination

Q. (By Mr. Purdy): Mr. Jones, will you state whether or not Mr. McFee had collateral with your bank for the security or the repayment of this loan?

A. He had collateral, yes. [59]

Mr. Purdy: I believe that is all.

(Testimony of O. L. Jones.)

Redirect Examination

Q. (By Mr. Patten): What type of collateral did he have?

A. Stocks, bonds and real estate.

Q. Anything else?

A. Yes, there was also cashier's check left there but not used as collateral.

Q. Do you recall how many cashier's checks he had there as collateral? A. No.

Q. Was it a substantial amount?

A. I would not be prepared to say.

Mr. Patten: That is all, thank you, Mr. Jones.

Mr. Purdy: Nothing further.

B. E. ALLISON

Called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Patten): Where do you live, Mr. Allison? [60]

A. 901 Montana Ave., Coeur D'Alene.

Q. What is your business? A. Banking.

Q. With what bank are you associated?

A. The Idaho First National.

Q. And what is your position with that bank?

A. Manager.

Q. We asked you to bring certain records of the bank with you, could you hand them to the Bailiff, please? A. Yes, sir.

Q. Are you acquainted with the defendant in this proceeding? A. Yes sir.

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(Testimony of B. E. Allison.)

Mr. Patten: I ask that these documents be marked as Plaintiff's Exhibit No. 23.

Q. You have been handed some documents making up Exhibit No. 23, will you identify them for the jury?

A. This is the ledger record of the North Idaho Sales Co. from September 13, 1944, to July 23, 1947.

Q. Is that the business account of Mr. McFee?

A. This is the North Idaho Sales Co.

Q. You know Mr. McFee to be the operator of that?

A. I understood that he was interested in it.

Mr. Purdy: We object to that and ask that it be stricken.

The Court: Denied.

Mr. Patten: I would like to offer that in evidence [61] on the basis that the account has been identified.

The Court: I will grant that, the exhibit will be admitted. I don't think there is any question about it.

Q. Mr. Allison, you have brought a transcript of this account? A. Yes, sir.

Mr. Patten: I wonder if it would be permissible to substitute it at this time.

Mr. Purdy: I think if he identifies it we will not object.

The Court: Is it agreeable to substitute this in lieu of the exhibit?

Mr. Purdy: Yes, we will agree to that.

(Testimony of B. E. Allison.)

Mr. Patten: I might call attention to the fact that the transcript covers the years 1945 and 1946; the original starts with some items in 1944 and ends in 1947, that is the only difference.

The Court: Is that agreeable?

Mr. Purdy: Yes, we do not object to that.

Q. These are records of your bank?

A. Yes, sir.

Mr. Patten: I ask that these be marked as Plaintiff's Exhibit No. 24.

Q. The first document handed to you, what is that?

A. The ledger account for the Foresters Club from December 26, 1944, to October 18, 1945.

Q. That is an official record of the bank? [62]

A. Yes, sir.

Q. The Foresters Club in Coeur d'Alene?

A. Yes, sir.

Q. The other instrument that you have is a transcript of the account? A. Yes, sir.

Q. Is that a correct transcript?

A. It is a correct transcript from January 1, 1945, to October 18, 1945, the ledger sheet covers a larger period.

Mr. Patten: I offer Plaintiff's Exhibit No. 24 in evidence as the account of the Foresters Club being identified by the accountant heretofore called as being operated by Mr. McFee and having an account in this bank.

Mr. Purdy: No objection.

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(Testimony of B. E. Allison.)

The Court: Do you have any objection to the copy being substituted?

Mr. Purdy: No objection.

The Court: It may be admitted and the copy may be substituted.

Mr. Patten: I ask that this be marked as Exhibit No. 25.

Q. Mr. Allison, the small sheet, can you identify that for the jury?

A. That is a ledger account of our bank of the Big Barn and Gem Club from March 2, 1944, to January 6, 1946; that is Exhibit No. 25. [63]

Q. And is the second document you have there a correct transcript of that?

A. It is a correct copy from December 31, 1944, to January 6, 1946, the ledger covers a larger period of time.

Mr. Patten: I offer Plaintiff's Exhibit No. 25 in evidence and ask permission to substitute the copy.

Mr. Purdy: May I ask a question on this?

The Court: Yes, you may.

Q. (By Mr. Purdy): Mr. Allison, who opened that account, do you know?

A. The account, No. 1, the ledger sheet authorizes the signature of A. F. McFee and W. D. Jacks, we usually have them sign on the ledger sheet.

Q. (By Mr. Purdy): That was a joint account?

A. That either signature could be recognized, yes, sir.

Mr. Purdy: That is all I care to ask.

(Testimony of B. E. Allison.)

Mr. Emigh: We object to this as not being binding on the defendant; a proper foundation is not laid to establish this account.

The Court: If it is not connected up so far as the other party is concerned it will be stricken.

Mr. Patten: I ask that this be marked as Exhibit No. 26.

Q. Mr. Allison, will you identify Plaintiff's Exhibit No. 26?

A. That is what is known in the bank as an inter-branch transaction, a credit slip indicating a transaction between two [64] of our branches. A transfer from Coeur d'Alene to Lewiston for the account of the Foresters Club, Lewiston, Idaho, in the amount of $3,000.00 dated December 23.

Q. What year? A. 1946.

Q. Is that a part of the official records of your bank? A. Yes, sir.

Mr. Patten: I ask that Exhibit No. 26 be admitted in evidence.

Mr. Purdy: May I ask a question?

The Court: Yes.

Q. By Mr. Purdy): Is there any way that you can tell who requested the transfer of that money?

A. No, there isn't.

Mr. Purdy: We object to it unless it is connected with this defendant.

The Court: Overruled, it may be admitted. At this time we will recess until 10:00 o'clock tomorrow morning.

(Testimony of B. E. Allison.)

April 24, 1952, 10:00 o'clock a.m.

Q. Mr. Allison, for the benefit of the Court and jury will you identify Exhibit No. 26?

A. That is a correct copy of the inter-branch transaction that passed between the Lewiston branch and our own bank on [65] December 23, 1946, indicating a transfer of $3,000.00 for the credit of the Foresters Club of Lewiston.

Q. As I understand it the Coeur d'Alene office received $3,000.00 which was credited to the account of the Foresters Club at Lewiston?

A. That is correct.

Q. From that slip can you tell the nature of the funds that your bank received?

A. We have a system in the bank or had at that time of marking cash receipts with a red pencil to the left of the amount and this is so marked, indicating that it was cash.

Q. You mean by cash, checks or currency?

A. I didn't handle the transaction personally, it was handled in the teller's cage and they count the cash separate from other transactions.

Mr. Patten: I offer this in evidence at this time.

Mr. Purdy: The same objection as we interposed to the appearance of Mr. W. D. Jacks' signature part of Exhibit No. 25.

Q. Does that copy have a signature on it?

A. No, it does not.

The Court: It may be admitted.

Mr. Patten: I would like to withdraw this witness at this time and call another.

The Court: Very well, you may do so. [66]

LEO W. JESSIE

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): What is your address, Mr. Jessie?

A. 1132 8th St., Clarkston, Washington.

Q. And what is your business?

A. Vice-President and manager of the First Security Bank at Lewiston.

Q. How long have you held that position?

A. 30 years in that bank.

Q. We asked for some official records of the bank, do you have them? A. Yes, sir.

Mr. Patten: May this be marked as Plaintiff's Exhibit No. 27.

Q. Now, Mr. Jessie, can you identify Exhibit No. 27?

A. These are the original ledger sheets covering the checking account in our bank of the North Idaho Sales, covering the period of May 31, 1944, to December 8, 1947.

Q. Are these official records of your bank?

A. Yes, sir.

Mr. Patten: We would like to offer Exhibit No. 27 in [67] evidence.

Mr. Purdy: No objection.

The Court: It may be admitted.

Mr. Patten: I think you may cross examine.

Mr. Purdy: No cross examination.

R. A. WOOD

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Mr. Wood, what is your address and business?

A. 1104 12th St., Clarkston, Washington. I am Assistant Manager of the Idaho First National Bank at Lewiston, Idaho.

Q. How long have you been in that bank?

A. Since August 1, 1940.

Q. Do you have in your custody the original records of the bank which we requested Mr. O'Neil to bring?

A. Yes, I came up for him, I have those original records.

Mr. Patten: I ask that these be marked as Plaintiff's Exhibit No. 28.

Q. Could you identify Plaintiff's Exhibit No. 28 for the jury?

A. The original ledger sheets of the Idaho First National Bank of the checking account of the Foresters Club covering the period of December 28, 1944, to June 4, 1947, inclusive. [68]

Q. They are original records of the bank?

A. Yes, sir.

Mr. Patten: I offer these in evidence,—Let me ask one question.

Q. The North Idaho Sales, did they have an account with your bank during that period?

A. Not in the period specified.

(Testimony of R. A. Wood.)

Mr. Purdy: We have no objection to the exhibit.

The Court: It may be admitted.

Q. Does your bank have an account in the name of A. F. McFee? A. Not a personal account.

Q. Has your bank loaned any money to Mr. McFee during the years 1944 to 1947?

A. None, to my knowledge, ever.

Q. I think I requested another record from your bank?

A. I cannot produce that, it was destroyed in the head office, destruction of records after five years.

Q. Could you look at Plaintiff's Exhibit No. 26 and your Exhibit No. 28 and tell us if the funds for that transfer was credited to the account of the Foresters Club?

A. Plaintiff's Exhibit No. 26 is an inter-branch clearing transaction wherein the Coeur d'Alene branch of the Idaho First National Bank transferred to the Lewiston Branch of the Idaho First National for credit to the account of the Foresters Club, the date of the inter-branch clearing slip is December 23, 1946,—this $3,000.00 item was credited to [69] the account of the Foresters Club on December 28, 1946.

Mr. Patten: You may cross examine.

Mr. Purdy: No questions.

C. E. ALLISON

Recalled as a witness for the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Mr. Allison, will you refer to the original of Exhibit No. 25?

A. Yes, I have it.

Q. When was Mr. Jacks authorized to draw on that account?

A. It was opened March 2, 1944; that would be the time it was authorized; I have a memorandum here, March 2, 1944.

Q. Who was the other authorized signature?

A. Mr. McFee.

Q. How long thereafter was Mr. Jacks authorized to sign checks on that account?

A. Apparently the authorization of Mr. Jacks ceased on July 17, 1944.

Q. During the years 1945 and 1946 did Mr. Jacks have authorization in connection with that account?

A. Not according to my record. [70]

Mr. Patten: We introduced that evidence to overcome the objection to this exhibit by counsel. You may cross examine.

Mr. Purdy: No cross examination.

Mr. Patten: I would like to make an offer in explanation of proof outside of the hearing of the jury.

The Court: Very well, I will excuse the jury

at this time and you will be called by the Bailiff.

(In the absence of the jury.)

Mr. Patten: I will have this marked as Exhibit No. 29. Your Honor, we are introducing this solely for showing the expenditures of certain funds, the record of the Clerk of the United States District Court will show that Mr. McFee was convicted of a previous offense and,——

Mr. Emigh: The defendant will object to the use of Exhibit No. 29 for the reasons, first, that no proper foundation has been laid, and, second, as indicated from evidence preceding this, the testimony which will be necessary to connect this whole transaction would be that of attorneys at that time acting for the defendant in this case and in that connection would involve oral instructions given to that attorney or those attorneys which are privileged communications. The entire testimony of that attorney would be privileged as based on communications between the attorney and the defendant and this particular evidence is highly prejudicial in character if admissible at all, the order of proof should be such that the [71] foundation is laid before any such prejudicial evidence is even offered.

Mr. Patten: I propose to show payments shown on there; I do not propose to call any attorney,——

The Court: I am satisfied that this is admissible for the purpose of showing payments of money, however, the question that the Court has in mind is whether other matters in the exhibit would be prejudicial to the defendant to the extent that it should not be admitted. The fact that it shows

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that he was convicted of this offense, of course, also shows that he paid fines. As far as the payment of money is concerned that, I am satisfied, would be admissible.

Mr. Emigh: May I ask if the testimony would not of necessity, in order to connect it up, depend upon instructions given by the defendant to his attorneys which, of course, would be privileged.

The Court: The only question I have now for consideration is the question of whether this instrument contains other information that would be highly prejudicial.

Mr. Patten: I would be willing to stipulate that these amounts were paid.

The Court: If counsel will stipulate to that then it will do away with the necessity of putting in the exhibit. I am inclined to admit it but I think I should give counsel an opportunity to stipulate if they care to do so.

Mr. Emigh: This is offered to prove the corpus delicti, [72] then, we could not stipulate.

The Court: Just so that counsel will have plenty of opportunity to study the matter I will say that it is my present intention to admit this, however, I want you to have an opportunity to go over this matter. If you gentlemen agree on a stipulation then of course it will not be necessary to consider the admission of the exhibit.

Mr. Emigh: We were about to agree and I think possibly without guaranteeing to the Court that we can do so, I think we can work out something that will be satisfactory to the Government.

The Court: It seems to be a very simple matter I will take a recess for five minutes at this time and you may then have your stipulation ready if you care to stipulate.

(The following proceedings were had after the recess in the absence of the jury.)

Mr. Patten: Counsel for the defendant and for the Government have agreed that we will withdraw Exhibit No. 29 previously offered by the Government and in lieu thereof we will substitute a stipulation which I would like to put in the record.

Mr. Emigh: I think that goes beyond the bill of particulars. We have a motion that should be acted upon.

The Court: If it was given to you before the trial of course the motion to amend would be granted. I will call the jury and you may read your stipulation into the record. [73]

(The following in the presence of the jury.)

Mr. Patten: It is hereby stipulated between counsel for the plaintiff, United States of America, and counsel for the defendant, A. F. McFee, that the cash book of the District Court of the District of North Dakota shows that on March 25, 1946, the following payments were made and credited to the account of the individuals: A. F. McFee, $25,000.00; Robert F. McDonald, $4,000.00; Fred Schwenk, $2,500.00.

The Court: Ladies and gentlemen of the jury, you will take this stipulation just as if a witness

was on the stand testifying that this money was paid as stipulated. You may call your next witness.

FRED SCHWENK, JR.

Called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Rossi): Your name is Fred Schwenk? A. Yes, sir.

Q. Where do you reside?

A. 1912 West Gardner, Spokane, Washington.

Q. Do you recall borrowing money from Mr. McFee about March 25, 1946? [74]

A. There was a fine paid of $2,500.00 for me, yes sir.

Q. Did you borrow he money from Mr. McFee?

A. Yes, sir.

Mr. Purdy: I move to strike the answer to that previous question as not being responsive.

The Court: Yes, that is right, is may be stricken. That is the answer to the former question concerning a fine being paid.

Q. Now, you state that you borrowed $2,500.00 about March 25, 1946 from Mr. McFee, is that the McFee that is the defendant in this case?

A. Yes, sir.

Q. What evidence of this obligation did you give to Mr. McFee?

A. My recollection is that I gave him a note.

Q. For $2,500.00? A. Yes, sir.

Q. You have heard the stipulation that was made just prior to your taking the stand?

(Testimony of Fred Schwenk, Jr.)

A. Yes, sir.

Q. I will ask you if that $2,500.00 which was paid to the District Court of the United States for the District of North Dakota was the $2,500.00 that you borrowed from Mr. McFee?

A. Yes, sir.

Q. Now, in connection to the matter pertaining to the District Court of the United States for the District of North Dakota [75] did Mr. McFee loan you any other money? A. No, he did not.

Q. As a matter of fact did Mr. McFee pay the sum of $1,000.00 to Mr. Stern for your benefit?

Mr. Purdy: That is objected to as improper, it is leading and suggestive and it is an attempt to impeach his own witness.

The Court: It is somewhat leading but I will let him answer.

A. I am not aware of it, I cannot remember it if he did.

Q. Can you refresh your memory from that (handing witness a document)?

A. This statement says that but as I recall it I cannot be positive.

Q. What is your recollection?

A. That there was $2,500.00 paid for me that is all I can remember.

Mr. Emigh: We move that the answer be stricken and the jury instructed to disregard it entirely.

The Court: His answer may stand.

Q. You cannot further refresh your recollec-

(Testimony of Fred Schwenk, Jr.)

tion? A. No, sir, I cannot.

Q. Have you ever paid this back to Mr. MeeFe?

A. No, sir, I haven't.

Q. What was your relationship with Mr. McFee at that time?

Mr. Emigh: We object to that as being incompetent, [76] irrelevant and immaterial and not an issue in this case as to the relationship and these other matters, it is leading to highly prejudicial matters that have been guarded against.

Mr. Rossi: I will withdraw the question.

Q. At the time that you borrowed that money from Mr. McFee did you have any conversation with him concerning this matter? A. Yes, sir.

Mr. Emigh: I think I will object to that.

The Court: He has answered, the answer as to whether he had a conversation may stand.

Mr. Emigh: May I ask that they be required to make an offer of proof so that we can protect our client in this matter.

Mr. Rossi: One of the elements required is the elecent of intent to defraud the United States.

The Court: I will excuse the jury and take your offer.

(In the absence of the jury.)

The Court: Now, just what do you expect to show?

Mr. Rossi: We expect to show by this witness that this was a fine paid by Mr. McFee in the case in the United States District Court of North Dakota. The fine was paid by Mr. McFee for this

(Testimony of Fred Schwenk, Jr.)

man and there was no intention that the money would be repaid and that it has not been repaid as the witness has already testified.

The Court: You may go this far. The witness will be permitted to testify that it was a fine and that he has [77] this information and that at the time this money was paid that it was understood that it wasn't to be repaid. You may show that.

Mr. Emigh: We wish to object to the offer of proof. It is an attempt to impeach a written instrument.

(The following in the presence of the jury.)

The Court: He may answer. The witness may answer with the limitation on the question.

Q. I asked if you had any conversation with Mr. McFee regarding this amount of $2,500.00 prior to the time it was borrowed from Mr. McFee?

A. Yes, sir.

Q. Now you will answer the question in accordance with the ruling of the Court.

A. I had a conversation about this $2,500.00 before it was loaned to me.

Q. Will you tell the Court and jury what that conversation was in connection with, leaving out the portion as the ruling of the Court indicated.

Mr. Emigh: May the record show that the defendant objects to this; the answer sought to be elicited at this time for the reason attempts to impeach their own witness or rather it is an attempt to impeach an written instrument and a conclusion as to the mental status of another person.

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(Testimony of Fred Schwenk, Jr.)

A. That he was to loan this money to me, that it was to be repaid, I gave him a note for it. [78]

Q. Has it been repaid? A. No, sir.

Q Has Mr. McFee ever made a demand for this money?

Mr. Purdy: We object to that as being immaterial, it is incompetent, irrelevant and immaterial and further it is based upon a document not in evidence, which might or might not under the terms be due at this time.

The Court: The Court has ruled, you may go ahead.

A. There has been no demand to pay this note.

Q. What was the face amount of this note?

A. In my hazy recollection it was $2,500.00.

Q. As you previously stated, this was the amount paid into the office of the Clerk of the Court.

A. Yes, sir.

Mr. Rossi: You may cross-examine.

Mr. Purdy: No questions.

R. E. McDONALD

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you give your address please?

A. 51 River St., Wallace, Idaho.

Q. Are you acquainted with the defendant, Austin F. McFee? [79] A. Yes, sir.

Q. You have been associated with him for a

(Testimony of R. E. McDonald.)

number of years? A. Not all of the time.

Q. You have been associated in business with him? A. A little.

Q. Did you hear the stipulation that was previously read in this Court concerning the sum of $4,000.00 for the District Court of North Dakota, that was paid into that Court about March 25, 1946? A. Yes, sir.

Q. In that stipulation it was stated that the sum of $4,000.00 was paid by you, is that correct?

A. Yes, sir.

Q. Mr. McDonald, from what source did that money come?

Mr. Purdy: That is objected to on the same basis that we objected to the testimony of the former witness.

The Court: If it didn't come from Mr. McFee I will sustain the objection.

Mr. Patten: I will withdraw the question.

Q. I will ask you from whom you obtained that money? A. Mr. Keane.

Q. Who is he?

A. An attorney at Walace, Idaho.

Q. Was he acting as your attorney at the time?

A. Yes, sir.

Q. Did you borrow this money from Mr. Keane?

Mr. Emigh: We will object to that as being privileged.

The Court: He may answer.

A. Yes, isr.

The Court: The Court will not confine the Gov-

(Testimony of R. E. McDonald.)

ernment nor the defendant to only one question of a witness, we cannot get all the evidence in with one question.

Q. What was the total amount that you borrowed from Mr. Keane? A. $4,750.00.

Q. Have you repaid that amount to Mr. Keane?

A. No, I haven't.

Q. Do you know who is the holder in due course of that obligation?

A. Only what Mr. Rice informed me.

Q. Do you know of your own knowledge who is the holder of that note? A. No, sir.

Q. Have you ever made any payment on that note? A. No, sir.

Mr. Patten: No further questions.

Mr. Purdy: As I understand it this testimony is going in with the understanding that unless it is connected up it will be stricken.

The Court: Yes, it will have to be traced to Mr. McFee, the defendant here.

Mr. Purdy: We have no cross-examination. [81]

FRANCIS MURPHY

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you give your address to the jury?

A. 11 Broadway, Fargo, North Dakota.

Q. What is your business? A. Lawyer.

(Testimony of Francis Murphy.)

Q. How long have you been a member of the bar?

A. That is not fair—about 50 years, I think.

Q. I understand that you specialized in trial work? A. Yes, sir.

Q. Do you know the defendant in this proceeding?

A. Yes, sir, I have known Mr. McFee.

Q. Do you know Mr. McDonald who was just on the stand? A. Yes, sir.

Q. How did you meet Mr. McDonald?

Mr. Purdy: That is objected to as immaterial.

The Court: He may answer.

A. I was introduced to him by Mr. Stern, who was his lawyer.

Q. Did you represent Mr. McDonald in North Dakota, in a proceeding in the District Court of the United States for the District of North Dakota? [82] A. Yes, sir.

Q. This is rather a delicate question, did you get paid for representing him?

Mr. Purdy: That is objected to as privileged between the defendant and his attorney.

The Court: He may answer.

A. Yes, I did get paid.

Q. How much did you get paid?

Mr. Purdy: May this go in under our objection?

The Court: Yes, with the same ruling.

A. $3,000.00.

Q. How was that paid?

(Testimony of Francis Murphy.)

A. Mr. Stern paid me $1,500.00 at Bismarck while we were there a short time later——

Q. Was that in the Patterson Hotel?

A. Yes, sir.

Q. How was that paid?

A. In currency, cash.

Q. Do you remember the denomination of the currency? A. No, sir.

Q. Were they large bills?

A. I don't recall that at all.

Q. You received the remainder of the fee, did you?

A. Yes, sir, at Fargo a short time afterwards.

Q. Who paid that? A. Mr. Stern. [83]

Q. How was that paid? A. In currency.

Mr. Patten: You may cross-examine.

Mr. Purdy: No questions.

Mr. Patten: I wonder, if the Court please, if this witness may be excused?

The Court: If it is agreeable with counsel for the defendant.

Mr. Purdy: We have no objection.

The Court: Then you may be excused Mr. Murphy.

N. I. ROOPE

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): What is your address?

A. 229 Avenue C, West Bismarck, North Dakota.

Q. What is your business? A. Banking.

(Testimony of N. I. Roope.)

Q. What bank are you associated with?

A. The First National Bank of Bismark.

Q. And what is your position with that bank?

A. Vice-president. [84]

Q. How long have you been associated with that bank? A. 25 years.

Q. Where is that with reference to the Patterson Hotel? A. It is just a block west.

Q. We have asked you to bring certain records of the bank here. A. Yes, sir.

Mr. Patten: I wonder if I may use the blackboard here to illustrate?

The Court: Yes, you may do that.

Mr. Patten: I am going to write on the board the stipulation read into the record.

Mr. Emigh: I think that we object to that on the ground that it tends to substitute evidence in this case, this isn't proper evidence, it is not proper for illustrative purposes, it is not a matter to be illustrated, it is not a map or a diagram, it is a matter that is in evidence.

The Court: Is this something that you want the witness to explain.

Mr. Patten: It is for the purpose of explanation.

The Court: You may place such diagram on the board as you desire and if I determine it is improper I will strike it.

(The following was placed on the blackboard; A. F. McFee $10,000.00; Robert McDonald $4,000.00; Fred Schwenk $2,500.00; total $16,500.00.)

Mr. Patten: I will ask that this document be

(Testimony of N. I. Roope.)

marked [85] for identification as Plaintiff's Exhibit No. 30.

Q. Mr. Roope do you recognize this exhibit?

A. Yes, sir.

Mr. Patten: I also ask that this be marked as Exhibit No. 31.

Q. Do you recognize this? A. Yes, sir.

Q. Will you tell the jury what they are?

A. Exhibit No. 30 is a cashier's check No. 10018 dated March 21, 1946 issued to the Clerk of the United States District Court.

Mr. Emigh: I object to this, I don't think it is necessary to read the exhibit.

Q. Is that an official record of your bank?

A. Yes, sir.

Q. Is Exhibit No. 31 an official record of your bank? A. Yes, sir.

Mr. Patten: I would like to offer them in evidence at this time.

Mr. Emigh: May we ask a question?

The Court: You may.

Q. (By Mr. Emigh): Calling your attention to Exhibit No. 30 I will ask you if this is a memorandum that someone placed there after these checks were made (indicating) and are I refer to the memorandum in the upper left hand corner of Exhibit No. 30, is it also true of Exhibit No. 31?

A. Yes, sir.

Mr. Emigh: We will object to these exhibits.

The Court: You can erase that and the exhibit

(Testimony of N. I. Roope.)

will be admitted. They don't amount to anything, the notations.

Q. Would you further identify Exhibit No. 30?

A. That is a cashier's check No. 10018 dated March 21, 1946 issued to the Clerk of the United States District Court for $2,500.00.

Q. And the endorsement on the back?

A. It is endorsed by the Clerk of the United States District Court Beatrice A. McMichael, Clerk.

Mr. Patten: May I have permission to hand that to the jury?

The Court: Yes.

Q. Now will you continue to further identify Exhibit No. 31?

A. That is a cashier's check on the First National Bank of Bismarck, North Dakota, No. 10017 dated March 21, 1946, issued to the Clerk of the United States District Court for $11,500.00, it is endorsed by the Clerk of the United States District Court, Beatrice A. McMichael, Clerk.

Q. I have correctly entered the amounts of these checks on the board have I? A. Yes, sir.

Q. Do you recall who purchased those checks from you? A. Yes, sir. [87]

Q. Who was that?

A. E. M. Stern of Fargo, North Dakota.

Q. Is he in the Court room?

A. Yes sir, right there (indicating).

Mr. Patten: May the record show that the witness identified Mr. E. M. Stern.

POOR COPY

(Testimony of N. I. Roope.)

Q. How was the bank paid for issuing those checks?

A. By cashier's check on the Fargo Bank for $6,500.00 and $7,500.00 in currency.

Q. Was anyone with Mr. Stern when he purchased the checks? A. Yes, sir.

Q. Did you know that individual?

A. I didn't know him.

Q. Do you see him here in the Court room?

A. Yes, sir.

Mr. Patten: May the record show that the witness identified Mr. F. C. Keane. You may cross-examine the witness.

Mr. Purdy: No cross-examination.

Mr. Patten: May this witness be excused?

The Court: With the permission of counsel he may be.

E. M. STERN

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination [88]

Q. (By Mr. Patten): Will you give your full name? A. Emanuel M. Stern.

Q. And what is your address?

A. 1204 Broadway, North Dakota.

Q. You are a lawyer? A. That is correct.

Q. And how long have you practiced law?

A. 22 years.

Q. Do you know the defendant in this proceeding? A. Yes, sir, I do.

Q. How long have you known him?

(Testimony of E. M. Stern.)

A. Since, I believe, 1943.

Q. You have been handed Exhibit No. 17. With reference to that exhibit do you recognize it?

A. Yes, sir.

Mr. Emigh: May we ask the witness a question?

The Court: You may.

Q. (By Mr. Emigh): Did you at the time referred to represent Mr. McFee as his attorney?

A. Yes, sir, I was representing him.

Q. (By Mr. Emigh): The exhibit which you hold is a matter relating to that service?

A. Yes, sir.

Mr. Emigh: May it please the Court, if this witness testifies obviously it will be matters which he received the information concerning, while he was serving as attorney for Mr. McFee and would be privileged within his profession as [89] attorney.

The Court: I will not require him to put in any matters except as to the payment of money.

Q. Do you recognize these checks?

A. Yes, sir.

Q. With reference to the largest check, what is the amount of that? A. $12,500.00.

Q. From whom did you receive that check?

Mr. Emigh: We object to that as——

Mr. Patten: I will withdraw that.

Q. Will you tell me what you did with the check?

A. Deposited it in the Dakota National Bank at Fargo, North Dakota.

Q. Is that your indorsement? A. Yes, sir.

(Testimony of E. M. Stern.)

Q. Directly or indirectly was that check used to make payment to the District Court of the United States which I have listed here?

Mr. Emigh: We object to that as being within the privilege.

The Court: He may answer.

A. Partially.

Q. With respect to the smaller check, returning to the larger check, is that your indorsement?

A. Yes, sir. [90]

Q. What did you do with this other check?

Mr. Emigh: May the similar testimony as to this check go in under the same objection?

The Court: If there are any further grounds you may tell the Court, go ahead.

Q. The $12,500.00 check does that bear your indorsement? A. Yes, sir.

Q. And what was done with that?

A. Deposited to my account in the Dakota National Bank, Fargo, North Dakota.

Q. Now the smaller check, what is the amount of that? A. $3,000.00.

Q. Does that bear your endorsement?

A. Yes, sir.

Q. Tell the jury what you did with the funds involved in that check.

A. I cashed the check and gave the funds to my client.

Q. Who was your client? A. Mr. McFee.

Q. Will you tell the Court how you received those two checks? A. By mail, I think.

(Testimony of E. M. Stern.)

Q. From whom?

A. I don't exactly recall from whom, who may have sent them, I am quite certain that I received them by mail, this something over six years ago.

Q. With respect to the check for $12,500.00 you stated that [91] you used that to pay a fine?

Mr. Emigh: We object to that as repetition.

The Court: He may answer.

A. Yes, sir.

(By Mr. Patten): We offer the check in evidence.

Mr. Emigh: I would like to object to counsel's question, it is going beyond the matters stipulated to, it is a violation of the stipulation and it is highly prejudicial.

The Court: The jury will disregard the one word used in the question by counsel that it was for the payment of a fine, that would have nothing to do with this case.

Mr. Patten: I offer Exhibit No. 17 in evidence.

The Court: It may be admitted.

Q. Mr. Stern, did you represent McFee—I believe that you stated that you did.

A. Yes, sir, I did.

Q. Were you paid for your services in that connection?

Mr. Emigh: We object to that as being privileged.

The Court: He may answer.

A. Yes, sir.

Q. What amount were you paid?

(Testimony of E. M. Stern.)

Mr. Emigh: We make the same objection to this line of testimony.

The Court: He may answer.

A. $3,000.00.

Q. Did you receive anything else by way of expenses? [92] A. Yes, sir.

Q. How much? A. $1,500.00.

Q. And you received these funds from whom?

Mr. Emigh: I wish to move that the answer be stricken as to the payment of attorney's fee because the Government is limited to the amount of $3,000.00 attorney's fee in their bill of particulars and this is going in to matters beyond the bill of particulars to which they are limited.

The Court: The motion is denied.

Q. You say that you were paid $1,500.00 in expenses?

A. The $1,500.00 was not to me, but to Clayton Keane, attorney of Wallace, $3,000.00 was retained of the checks that I received, they have been mentioned.

Q. Will you give the jury an accounting of the funds that you received in connection with this matter, and the disposition you made of them.

Mr. Emigh: We object to that as going into the matter of the relationship between attorney and client. It is going beyond the boundaries of the bill of particulars.

The Court: He may answer.

A. I received a check for $12,500.00 and $2,-

(Testimony of E. M. Stern.)

500.00 which made a total of $15,000.00 then Mr. Keane and myself——

Q. What were the first funds that you received?

A. $2,500.00.

Q. What form was that? [93]

A. Currency.

Q. From whom did you receive that?

A. I cannot tell exactly but it was one of the three clients that I represented; that was in Fargo.

Q. Who were your clients, those three?

A. Mr. McFee, Mr. McDonald and Mr. Schwenk.

Q. What was the next amount that you received?

A. $12,500.00.

Q. And what was the first disbursement that you made out of those funds?

A. The first disbursement was the $2,500.00.

Q. And to whom did you make that?

Mr. Emigh: We object to that as repetition and it is incompetent, irrelevant and immaterial.

The Court: He may state who it was to.

A. To the Clerk of the United States District Court for the District of North Dakota.

Q. How was that made?

A. By cashier's draft.

Q. On what bank?

A. The Dakota National Bank.

Q. And the amount was $2,500.00?

A. Yes, sir.

Q. You were with Clayton Keane when you purchased the cashier's check that Mr. Roope testified about? A. Yes sir. [94]

(Testimony of E. M. Stern.)

Q. What did Mr. Keane pay the First National Bank or the Dakota National Bank I believe it was to Bismarck to obtain this cashier's check?

A. $2,500.00.

Q. Did you pay Mr. Francis Murphy in this matter? A. Yes, sir, I did.

Q. You paid him his fee? A. Yes, sir.

Q. Your fee and his fee amounted to what?

A. $6,000.00.

Q. Can you tell me Mr. Stern the funds in total that you received in connection with this matter?

A. $2,500.00 and $12,500.00.

Mr. Emigh: We object to this, it is repetition, the witness has testified twice to this matter.

The Court: He may answer, or rather the answer may stand.

Q. The first amount was $2,500.00?

A. Yes, $2,500.00.

Q. In currency? A. That is correct.

Q. And next was $12,500.00?

A. $12,500.00.

Q. And the next?

A. $3,000.00, however, this exhibit then was chased and returned [95] to Mr. McFee.

Q. According to my figures you paid the Clerk $16,500.00? A. Yes.

Q. And Mr. Murphy received with you, $23,-500.00? A. $22,500.00.

Q. And those are the funds that you received?

A. Yes.

Q. Those funds were supplied by Mr. Keane?

(Testimony of E. M. Stern.)

A. That is correct.

Q. And those amounted to $22,500.00?

A. That is correct.

Q. You received some expense funds I believe you stated? A. Yes, sir.

Q. How much was that? A. $1,500.00.

Q. How did you receive that?

A. Cash from Clayton Keane.

Mr. Patten: That is all, you may cross-examine.

Mr. Emigh: No questions at the present time of this witness.

The Court: We will recess at this time until 2:00 o'clock.

April 24, 1952, 2:00 o'clock p.m. [96]

Mr. Patten: In connection with the testimony of Mr. Emasio yesterday there was a matter that I want to clear up. We have agreed upon a stipulation.

The Court: You may state your stipulation.

Mr. Patten: The stipulation is as follows: It may be stipulated by and between the Government and the defendant that the general ledgers to which the witness Emasio testified to yesterday were the general ledgers of the business enterprises known as the North Idaho Sales Co.; the Foresters Club of Coeur d'Alene; the Foresters Club of Lewiston; the Gem Club of Athol, Idaho.

The Court: Then it may be so stipulated.

A. M. ERIKSOMEN

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you tell the jury your address?

A. 704 Broadway, Fargo, North Dakota.

Q. What is your business? A. Banking.

Q With what bank?

A. The Dakota National Bank of Fargo. [97]

Q. What is your position with that bank?

A. Cashier.

Q. Do you have some official records of that bank that you were requested to bring here?

A. Yes, I have both the originals and copies.

Mr. Patten: I ask that this be marked as Exhibit No. 32.

Q. Do you recognize that document?

A. Yes, sir.

Q. Is it a part of the official records of that bank?

A. The permanent record of the savings account of E. M. Stern, in the Dakota National Bank from June 2, 1941 to December 3, 1947.

Mr. Patten: I would like to offer this in evidence. The copy that we propose to substitute is limited to 1946.

Mr. Emigh: The portions shown on the copy will be covered by that period?

Mr. Patten: That is right.

(Testimony of A. M. Eriksomen.)

Mr. Emigh: We have no objection insofar as that period is concerned.

The Court: Then you may have the copy marked as an exhibit.

Mr. Patten: I would like to have this marked as Plaintiff's Exhibit No. 33.

Q. Plaintiff's Exhibit No. 33 has been handed to you, is that an original record of the bank? [98]

A. This is a copy—this one (indicating) is the original record.

Q. The second piece of paper is a true copy?

A. Yes, it is.

Mr. Patten: I would like to offer this in evidence.

Mr. Emigh: No objection.

The Court: It may be admitted.

Q. Would you identify the exhibit to the jury?

A. This is a deposit slip.

Q. In your savings department?

A. In our savings department, to the credit of E. M. Stern, No. 3674, January 26, 1946 the total amount is $2,818.95, the deposit is broken down to show currency, $2,800.00 and $18.95 silver.

Q. You have been handed Exhibit No. 34, do you recognize that as an official record of the bank?

A. Yes, sir.

Q. Will you identify that?

A. That is a deposit slip of the Dakota National Bank, dated February 1, 1946 to the credit of E. M. Stern, No. 3674 showing a deposit of $12,474.83 consisting of one item of $12,500.00 less a balance

(Testimony of A. M. Eriksomen.)

on bond deal of $25.17 showing a total deposit of $12,474.83.

Q. Is there any notation to identify the $12,500.00 item? A. A transit No., 92-56.

Q. What does that relate? [99]

A. The transit number can be identified as the bank that it was drawn on.

Q. You do not recall that?

A. No, I do not recall, but it could be ascertained.

Mr. Patten: I would like to offer Exhibit No. 34 in evidence.

Mr. Emigh: We wish to object to it as not properly identified. There is no proper foundation laid for the admission of the same.

The Court: It may be admitted, all of this has to be put piece-meal, the whole case cannot be put in at one time.

Q. Now you have been handed Exhibit No. 17, with reference to that exhibit, does that aid your memory as to the clearance number on Exhibit No. 34?

A. 17 is drawn—that is Exhibit No. 17 is drawn on the Idaho First National Bank, number 92-56 which would indicate that this item bears the indorsement of our bank dated February 1, 1946 which would indicate that this is the item deposited in the savings account.

Q. Now, you have been handed Plaintiff's Exhibit No. 35, can you identify that?

A. Yes, this is a cashier's check drawn by the

(Testimony of A. M. Eriksomen.)

Dakota National Bank of Fargo, North Dakota, No. 56734 dated February 18, 1946 payable to the Clerk of the United States District Court in the amount of $2,500.00.

Q. And the indorsement, will you give that?

A. Pay to the order of the First National Bank and Trust Co. of Fargo, North Dakota, Clerk of the United States District Court, Beatrice A. McMichael, Clerk, No. 216.

Mr. Patten: I want to offer this in evidence as Plaintiff's Exhibit No. 35.

Mr. Purdy: No objection.

The Court: It may be admitted.

Q. Mr. Eriksomen, you have been handed Plaintiff's Exhibit No. 36, do you recognize that as an original record of your bank? A. Yes, sir.

Q. Will you identify it?

A. It is a cashier's check of the Dakota National Bank, Fargo, North Dakota, payable to E. M. Stern for $6,500.00 dated March 6, 1946.

Q. Will you read the endorsement on that?

A. The Merchant's National Bank and Trust Co. paid March 23, 1946, Fargo, North Dakota, through clearing house and another indorsement, pay to the order of any bank, banker, or trust company. All prior indorsements guaranteed March 21, 1946, The First National Bank, Bismarck, North Dakota, B. F. Lawyer, Cashier.

Mr. Patten: I would like to offer that in evidence.

Mr. Purdy: No objections.

(Testimony of A. M. Eriksomen.)

The Court: It may be admitted.

Q. To whose account were those cashier checks charged, who [101 was the purchaser?

A. A withdrawal in the identical amount was made from the savings account of E. M. Stern in payment of these cashier's checks.

Mr. Patten: The witness is available for cross-examination.

Mr. Purdy: No questions.

F. CLAYTON KEANE

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you state your name? A. F. Clayton Keane.

Q. Will you spell your last name?

A. K-e-a-n-e.

Q. And what is your address?

A. Wallace, Idaho.

Q. No further address is necessary?

A. No, I think I am notorious enough with just that.

Q. What is your business or occupation?

A. I formerly practiced law until October 6 of last year, presently I am not employed.

Q. How long did you practice law? [102]

A. 30 odd years.

Q. And how long in Wallace?

A. Over 20 years.

(Testimony of F. Clayton Keane.)

Q. Do you know the defendant in this proceeding? A. Yes, sir, I do.

Q. How long have you known him?

A. Probably 30 years.

Q. Do you know him professionally?

A. Yes, sir.

Q. And did you know him socially?

A. Yes, sir.

Q. Was that acquaintance-ship a close one?

A. Yes, I think it was and it still is.

Q. I will ask you if you recognize the documents that you have in your hand?

Mr. Emigh: We object to this witness testifying as to the exhibits on the ground that it is privileged.

The Court: Mr. Emigh, I think probably that is an objection that you could not make. I think the witness may answer.

A. It is my desire to claim the privilege on the ground that the evidence is privileged, it is a transaction and a conversation that came to me in my capacity as an attorney, at that time I was representing Mr. McFee. I might state that at that time I was employed by Mr. McFee and had been for a number of years on a retainer basis. [103]

The Court: You will not be required to impart any conversation that is confidential, anything that Mr. McFee might have said, but you can testify as to those checks, where they came from and what was done with the money.

A. Very well, particularly as to Exhibit No. 17, it is my recollection that Mr. McFee——

(Testimony of F. Clayton Keane.)

Q. What is the amount of that?

A. $12,500.00.

Q. And what is the date?

A. January 28, 1946. It is my recollection that on that date Mr. McFee, either in my office or some other place around Wallace, gave me $12,-500.00 with instructions to secure a cashier's check. As I recall I turned it to my secretary and told her to get it, and that, I imagine, she did.

Q. What was the funds that you received, was it cash? A. Currency.

Q. Do you recall the second check?

A. I have no recollection but it was probably handled in the same manner. I don't think that I ever saw those cashier's checks until today in the Court room.

Q. Mr. O. L. Jones testified that the records show you to be the purchaser of the second check.

A. I have no independent recollection but it was probably handled by my secretary. I think that is the way it occurred.

Q. Have you been present in the Court room?

A. A part of the time, yes sir.

Q. Did you hear the testimony of——

Mr. Emigh: Now, if the Court please, I object to that as a comparison, an attempt to compare the testimony of another witness on the stand and to suggest to this witness that his testimony should conform with the other testimony and it is in the form of a leading and suggestive proceeding.

(Testimony of F. Clayton Keane.)

The Court: I suggest that the attorney finish with his question.

Mr. Emigh: But I think it is immaterial.

The Court: The Court will rule on that.

Mr. Patten: The witness has been handed Exhibit Nos. 30 and 31.

Q. Will you identify the documents which you hold in your hand, Mr. Keane?

A. They are cashier's checks, one in the sum of $2,500.00 and the other in the sum of $11,500.00 on the First National Bank of Bismarck, North Dakota.

Q. And the date?

A. March 21, 1946, each of them bears the same date.

Q. Do you remember or recognize those checks?

A. Yes, sir, I do.

Q. What if anything—did you purchase those checks?

A. It was a joint enterprise, the purchase was.

Q. How much of the funds did you supply to purchase those checks?

A. I would like to make an objection that it is a confidential [105] relationship between me and the parties interested in obtaining this money.

The Court: You may answer.

A. If I recall correctly, Mr. McFee, Mr. Schwenk, and Mr. McDonald, in a room of the hotel, I think it was the—I am not sure I think it was the Luna Hotel.

Q. That is a small hotel? A. Yes.

(Testimony of F. Clayton Keane.)

Q. You may go ahead with your answer Mr. Keane.

A. After certain proceedings that we had, I joined some other individuals in the room that one of us had there——

Q. ——Who were the individuals?

A. R. E. McDonald, Mr. Fred Schwenk and A. F. McFee.

Q. This meeting was on March 21?

A. Yes, Mr. McFee turned to me something in excess of $9,000.00, there was included in that a check of $500.00 but most of it was in currency, but there was a check for $500.00 on the Lewiston bank which was cashed in the bank in Bismarck, North Dakota.

Q. How much of these funds did you turn to the bank?

A. I think $7,500.00 paid for the purchase of the cashier's checks, $1,500.00 turned to Mr. Stern and if I recall correctly $400.00 or $500.00 that was returned to Mr. McFee by myself.

Q. Do you have with you a note signed by Mr. Fred Schwenk?

A. I do not, I made a search for it. It has been in my possession [106] but I didn't find it, I have a copy of it.

Q. With you? A. Yes, sir.

Q. It is embodied in a complaint which was prepared for filing an action?

A. The action was never instituted.

Q. Will you use that to refresh your memory?

(Testimony of F. Clayton Keane.)

A. I think this is objectionable but I can do it.

Mr. Emigh: I think the defendant objects that this is a privileged communication between client and counsel.

Mr. Patten: I didn't understand that he was attorney for Schwenk.

A. I didn't so state. I was acting for Mr. McFee and there was placed in my hands for the purpose of suit, and a complaint was prepared under my supervision, the action was never instituted. We didn't want to spend any more money, there was no reason to throw good money after bad.

Q. Who employed you to sue?

A. Mr. McFee.

Q. Will you read the amount of that note?

A. $5,500.00.

Q. The date of the note?

A. January 31, 1946.

Q. January 31, 1946?

A. According to the copy that I am refreshing my memory from.

Q. Do you know Robert McDonald? [107]

A. Yes, sir.

Q. How long have you known him?

A. About 20 years.

Q. Do you know him intimately?

A. Yes, intimately.

Q. What transaction, if any, have you had with Mr. McDonald—I believe that is too general.

A. Yes, I think it is.

(Testimony of F. Clayton Keane.)

Q. Did you loan any money to Mr. McDonald in 1946?

A. I would say no, I can explain that, there was a check written by me for $4,750.00 payable to Mr. McDonald and he indorsed that check, the money was actually advanced by someone else, it wasn't my money.

Q. Whose money was it?

A. Again I am claiming the privilege.

The Court: You may go ahead.

A. Mr. McFee's.

Mr. Patten: We submit the witness for cross-examination.

Cross-Examination

Q. (By Mr. Purdy): You did make an endeavor to collect the Schwenk note to the extent——

A. ——Yes, to the extent that we prepared a complaint, the action [108] was ready to be filed. We determined that there was no use.

Q. But it was placed in your hands for collection? A. It was, yes, sir.

Mr. Purdy: That is all.

Mr. Patten: That is all.

J. A. ALLEN

Called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten:) Will you spell your name? A. A-l-l-e-n.

(Testimony of J. A. Allen.)

Q. Where do you reside Mr. Allen?

A. Spokane, Washington.

Q. You have resided there for some time?

A. Since 1935 or 1937.

Q. What is the nature of your business?

A. Mining.

Q. How long have you been engaged in that business? A. 15 years.

Q. Are you acquainted with Mr. McFee, the defendant here? A. Yes, sir.

Q. How long have you known him? [109]

A. 15 years.

Q. Have you had any business dealings with Mr. McFee? A. Yes, sir.

Q. During the year 1946 did you have any business dealings with Mr. McFee?

A. Yes, sir, I did.

Q. Did you sell him any stock?

A. Yes, Coeur d' Alene Consolidated Mining Stock of which I am president—Mr. McFee purchased 150,000 shares for the total sum of $15,000.00.

Q. When was that?

A. A payment of $10,000.00 was made in cash and was sent to the company office in Wallace, Idaho on December 31, 1946.

Q. Did you receive any money from Mr. McFee in payment of this prior to that time?

A. A $5,000.00 check.

Q. That was paid to you?

A. Yes, I think it was.

Q. Did you cash the check?

(Testimony of J. A. Allen.)

A. Yes, the records would show that.

Q. You have been handed Exhibit No. 22, marked for identification, can you identify that?

A. Yes, that is a deposit slip for the Idaho First National Bank to the credit of J. A. Allen dated December 31, 1946, the total deposit showing $20,000.00.

Q. And what bank is that on? [110]

A. The Idaho First National of Wallace, Idaho.

Q. Did you deposit that?

A. The secretary in the office did.

Q. For you? A. Yes, sir.

Q. Do you have a duplicate deposit slip made at that time? A. Yes, sir.

Q. Will you refer to that, and where the printed word "currency" is, do you have anything written?

A. I do.

Q. And what was that? A. A. F. McFee.

Q. What does that indicate, that it was deposited to your account? A. Yes, sir.

Q. And how did you receive that?

A. I don't know just how, I know that it was not given to me but Mr. Grismer who was in charge of the operation, I think that he brought it to the office—it was from Mr. McFee.

Q. Was it paper or check?

A. Currency, as to the denominations, I don't know.

Q. That was deposited to your account?

A. Yes, for the Coeur d' Alene Consolidated, it was just being organized and they didn't start a

(Testimony of J. A. Allen.)

bank account until May 1947.

Q. That was for the purchase of stock? [111]

A. I cannot say because he had loaned—he had made loans for the payroll which had been repaid. Whether the previous payment in 1946 would constitute a loan or a part of this I would have to consult the records. However as this money was deposited, $10,000.00 in a check from another party, and that was paid out.

Q. But this $10,000.00 was for the payment of this stock? A. Yes, sir.

Q. And you put it in the bank?

A. Yes, sir.

Q. Did you issue the stock to Mr. McFee?

A. Yes, the record shows certificate number 40 for 150,000 shares delivered to Mr. McFee; the certificate in my name, J. A. Allen; somewhere near February 16, 1947 he informed the office that he had this stock as collateral or was going to use it as collateral and that he misplaced the certificate and we stopped any transfer on that certificate and issued certificate number 53 in the amount of 150,000 shares to A. F. McFee.

Mr. Patten: The Government asks that Exhibit Number 22 be admitted in evidence.

Mr. Purdy: It has not been identified and we object.

The Court: It may be admitted.

Mr. Patten: You may cross-examine.

Mr. Purdy: No cross-examination. [112]

M. R. ARNOLD

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): How do you spell your last name? A. A-r-n-o-l-d.

Q. Will you give your address?

A. 701 Foster, Coeur d' Alene, Idaho.

Q. How long have you lived here?

A. About two years.

Q. What is the nature of your business?

A. Tavern operator.

Q. And where was the tavern?

A. At State Line Village.

Q. What is the name of it?

A. The First and Last Chance.

Q. How long have you operated that?

A. Since 1942.

Q. Do you know Mr. McFee, the defendant in this action? A. Yes, sir.

Q. How long have you known him?

A. 30 years.

Q. Have you been quite well acquainted with him? [113] A. Yes, sir.

Q. Have you had any business relations the last few years? A. Yes, sir.

Q. And have you known him socially?

A. Yes, very well.

Q. Directing your attention to the month of March, or the first part of April, 1945, will you state whether or not you borrowed any money from

(Testimony of M. R. Arnold.)

the defendant in this action, Mr. McFee?

A. Yes, I did.

Q. How much? A. $5,000.00.

Q. How did you receive that?

A. In United States currency.

Q. Did you give any evidence of that to Mr. McFee? A. I gave him a note.

Q. Calling your attention, Mr. Arnold, to on or about the 7th of June 1947 I will ask you if you borrowed any money at that time from Mr. McFee, the defendant here? A. Yes, sir.

Q. How much? A. $2,000.00.

Q. Was that evidenced in any way?

A. No.

Q. How did he give you that money? [114]

A. In currency.

Q. Did you receive any additional money about that time? A. Yes, $1,400.00.

Q. And how did you receive that?

A. In currency.

Q. Did you evidence that by any note?

A. No, sir, no note.

Q. During 1945 or 1946 did you repay this money that you had borrowed?

A. No, I didn't.

Q. I will ask you to state whether or not prior to 1945 you borrowed any money from Mr. McFee?

A. Yes, sir.

Q. I will ask you whether or not you repaid Mr. McFee the money that you borrowed from him?

A. I have not.

(Testimony of M. R. Arnold.)

Q. Have you paid it now, at this time?

A. Yes, sir.

Q. When did you pay this money?

A. About the first of 1949 or the latter part of 1948.

Q. You didn't pay any of it back in 1945 or 1946? A. No, I didn't.

Q. With reference to those notes that you say that you gave Mr. McFee, did you receive those notes back from the defendant?

A. No sir, I didn't. [115]

Q. Do you know why? A. No, I don't.

Q. You didn't receive them back?

A. No, sir.

Q. Did you ask him to return them?

A. Once.

Q. And he didn't?

A. They were lost, he said.

Q. In any event, he didn't return them?

A. No, he didn't.

Mr. Patten: You may cross-examine.

Mr. Purdy: No cross-examination.

ROGER W. GREENOUGH

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you spell your last name? A. G-r-e-e-n-o-u-g-h.

(Testimony of Roger W. Greenough.)

Q. Where do you reside?

A. At the Atlas Mine, Mullan, Idaho.

Q. How long have you resided there?

A. Intermittently since 1924. [116]

Q. What is your business?

A. Currently I am president of the Atlas Mining Company.

Q. Do you know the defendant in this proceeding? A. Yes, sir, I do.

Q. Have you known him very long?

A. I would say for 27 or 28 years.

Q. Have you known him very well?

A. Very well, I think.

Q. You have been handed Plaintiff's Exhibit Number 19, do you know anything about that document? A. That is a cashier's check.

Q. What is the date of that?

A. November 2, 1946—I never saw it before.

Q. During the year 1946 did you purchase any cashier's checks at the Idaho First National Bank at Wallace? A. Not that I recall.

Q. Did you have any dealings with the Idaho First National Bank in 1946?

A. Yes, while I was residing in California a loan was arranged for me through Mr. McFee at the Idaho First National Bank.

Q. What was the purpose of that loan?

A. Well, I had——

Mr. Purdy: ——I don't think it is material.

Mr. Patten: I will admit that this is a little leading, but it is necessary to lead this witness to

(Testimony of Roger W. Greenough.)

give him the background. [117]

The Court: He may answer.

A. I was buying and selling real-estate in California. There was an opportunity there whereby I could use some money for a few months.

Q. Did you make any effort to obtain the money?

A. I had no banking connections there, we had property but it was unimproved.

Q. What did you do about this transaction?

A. Well, I wrote to Mr. McFee.

Q. And what did you say?

A. Substantially I outlined my situation with respect to collateral and assets and I told him that I had some property that was not acceptable as bank collateral and I didn't know what kind of financial condition he was in at that time; however, I would like to get this money and if he was not in shape to let me have it I asked him if he would go over and speak to Pete Jones and see if a loan could be arranged.

Q. What amount did you mention in your letter?

A. Well, I imagine that it was $5,000.00—that is the amount that I got.

Q. What was the date of that?

A. I would not have known unless I had seen and heard some of this testimony. I wouldn't have recalled that.

Q. Was that in the Fall?

A. Yes, it is evident that it was in the Fall, of 1946, this is dated in November. [118]

(Testimony of Roger W. Greenough.)

Mr. Purdy: I think this is rather irregular, I object to this on the ground that no proper foundation is laid.

The Court: He may answer, you may proceed Mr. Patten.

Q. Have you finished?

A. Well, it was about—it was apparently in the Fall of 1946, this ties up pretty well with my activities down there.

Q. Did you receive any answer from Mr. McFee? A. No, sir.

Q. What response did you receive from your letter?

A. A short letter from Mr. Jones of the Idaho First National Bank enclosing a note for my signature.

Q. What did the letter say?

A. It was a very short business letter.

Mr. Purdy: We object to this evidence, the letter would be the best evidence.

Q. Do you have the letter?

A. No, I don't, I looked for the letter and was unable to find it—I looked day before yesterday.

Q. Will you tell us, to the best of your memory, what was in the letter?

A. Well the principal thing was that Mr. McFee——

Mr. Emigh: ——This is an extra-judicial statement, it seems now that it is to be very prejudicial and we object to the testimony, it doesn't appear to be Mr. McFee's letter or in any manner to point to

(Testimony of Roger W. Greenough.)

Mr. McFee, and it would not bind him in any way. It is highly prejudicial and no proper foundation has been laid for the contents of this letter by [119] secondary evidence.

The Court: He may answer.

A. The principal thing that I was interested in was that Mr. McFee had called and told Mr. Jones or substantially that—that I would like to have a loan and that if I would sign the enclosed note and return it to the bank that the money would be on deposit for me whenever they got the note in the bank.

Q. Did you receive the funds? A. Yes.

Q. Did you repay that note?

A. Yes, I forget whether it was 3 or 6 months but I repaid it.

Mr. Patten: You may cross-examine the witness.

Cross-Examination

Q. (By Mr. Purdy): When did you pay that?

A. It was prior to the time it was due, I think it was in the spring of 1947.

Mr. Patten: May I ask one more question?

Mr. Purdy: Yes, go ahead.

Q. (By Mr. Patten): Did you repay that to the bank? A. Yes, sir, to the bank.

Mr. Patten: Thank you. [120]

Cross-Examination

Q. (By Mr. Purdy): You knew Mr. McFee

(Testimony of Roger W. Greenough.)

when he was a resident of Washington when he lived at Spokane?

A. Yes, I didn't think of that but I do believe that he was at the time I first knew him, but I met him the first time in Wallace, but I believe his residence was Washington.

Q. You testified that you got a letter from the bank after having addressed a letter to Mr. McFee telling Mr. McFee to tell them that you wanted a loan? A. Well, yes, he told the bank.

Q. And with that letter from the bank was a note to the bank for you to sign?

A. Yes, sir, with the letter from the bank.

Q. And you paid the bank when you paid the note off? A. Yes, sir, I paid the bank.

Q. The note was not made to Mr. McFee?

A. I never heard from Mr. McFee.

Q. And you paid no money to McFee?

A. I paid no money to him.

Mr. Purdy: That is all.

Mr. Patten: That is all.

The Court: We will take a recess at this time for 15 minutes. [121]

April 24, 1952, 3:15 o'clock p.m.

A. F. McCAIN

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Where do you live Mr. McCain?

(Testimony of A. F. McCain.)

A. Kellogg, at 603 South Division Street.

Q. And what is your business?

A. Grocery merchant.

Q. How long have you been in this business?

A. About 38 years.

Q. Where is your store located.

A. 127 McKinley.

Q. And what is the trade name of that store?

A. McCain's New Grocery.

Q. Do you know the defendant in this action, Mr. McFee? A. Yes, sir.

Q. How long have you known him?

A. 20 or 25 years.

Q. Directing your attention to the year—directing your attention around 1935, did you have any business dealings [122] with him?

A. He was employed in our meat department.

Q. In what capacity?

A. He was manager of the meat department which included other work.

Q. How many people were working in that department?

A. I think one at that time and possibly a second one worked too.

Q. When was Mr. McFee first employed by you?

A. In 1934 or 1935, our records were destroyed by fire.

Q. How long was he employed by you?

A. 8 or 10 months.

A. How long have you known him?

A. 20 or 25 years.

(Testimony of A. F. McCain.)

Q. Have your relationships been very cordial?

A. Yes, quite cordial.

Q. He was a close friend of yours?

A. Yes, a close friend.

Q. What salary did he earn?

A. 50 or 60 dollars a week salary with a 25% bonus on any earnings.

Q. Do you know whether he earned his bonus?

A. Some months yes, and some months no.

Q. What were Mr. McFee's duties in the store.

A. He operated the meat department, cutting meat and waited on the trade. [123]

Q. Who else was in the meat department?

A. I cannot be sure whether Mannie Andrews came at that time; he took over when Mr. McFee left.

Q. Did Mr. McFee cut the meat that was sold in the grocery store? A. Partially, yes.

Mr. Patten: We submit the witness for cross examination.

Cross Examination

Q. (By Mr. Purdy): You knew Mr. McFee while he was a resident of the state of Washington?

A. I think he was in the first place.

Q. That was in the '20s? A. Later '20s.

Q. Do you know whether Mr. McFee had other activities besides working for you?

A. Well——

Mr. Patten: ——Will you please set the date for that?

Q. Any time that you are testifying to.

(Testimony of A. F. McCain.)

A. I think he was starting operations in the slot machines line during a part of that time; I would not be sure about that.

Q. Slot machines, pin palls and things of that time? A. Yes, during the latter part.

Q. Do you know of any financial *bac standing* that Mr. McFee might have when you first got acquainted with him,—whether [124] he was a man of means or without means?

Mr. Patten: We object to that as calling for a conclusion of the witness.

The Court: It is not proper cross examination, I will sustain the objection.

Q. Do you recall any particular circumstances surrounding the fact that Mr. McFee went to work for you?

A. Yes. We had a man that we had to let go all at once and knowing Mr. McFee and knowing that he was a butcher I called him and asked him to take over to help us out and he said that he would.

Mr. Purdy: That is all.

Redirect Examination

Q. (By Mr. Patten): You have testified in reference to the period that Mr. McFee was employed,—you testified that he was engaged in another business?

A. That is my remembrance, that he was starting out in the line that he continued in.

Q. What time did the store open?

(Testimony of A. F. McCain.)

A. At eight o'clock.

Mr. Emigh: We object to this line of questioning as it is in the nature of cross examination by the Government of [125] their own witness and it is an attempt to impeach the witness.

The Court: The answer may stand, you may proceed. I haven't noticed that it was cross examination. You brought that out on cross examination as to his activity.

Q. What time did you open?

A. Eight o'clock.

Q. And what time did you require the employees to be there?

A. Not ahead of that time but sometimes he came ahead of time to line up the cases.

Q. What time did your store close?

A. At that time we closed at 6 o'clock, we close at 5:30 now.

Q. What time did you permit the employees to leave the store?

A. They were supposed to close up the butcher shop and he is allowed a few minutes, five or ten minutes to clean up according to the union rules.

Mr. Patten: That is all.

Mr. Purdy: That is all.

DAN MURPHY

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you state your name? [126] A. Dan Murphy.

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(Testimony of Dan Murphy.)

Q. And how do you spell Murphy?

A. M-u-r-p-h-y.

Q. Where do you live Mr. Murphy?

A. Wallace, Idaho.

Q. How long have you been there?

A. I have been there since 1908.

Q. What is your business? A. Mining.

Q. How long have you been engaged in mining?

A. Steady since I was 16 years old until a few years ago.

Q. Are you presently engaged in mining?

A. I am in partnership. I don't do any mining any more.

Q. Do you know Mr. McFee sitting at the table here (indicating)? A. I certainly do.

Q. How long have you known him?

A. Around 30 years.

Q. Have you known him very well?

A. Yes, sir, as well as anybody, I think.

Q. Have you had any business transactions with him?

A. Yes, sir, we had an agreement in the mining business.

Q. When did you enter into this agreement?

A. In 1945, I think it was, I ain't sure, my memory isn't what it used to be.

Q. What was the agreement?

Mr. Purdy: If the agreement is in writing it would [127] be the best evidence of the terms unless he just wants a general statement.

Mr. Patten: Just a general statement.

(Testimony of Dan Murphy.)

Q. What was this business transaction that you had with Mr. McFee?

A. Mr. McFee was going to put up the money and I was going to run the properties.

Q. What were those properties?

A. The Dan Mac Lease.

Q. Where was that?

A. In the Burke canyon.

Q. On the right hand side? A. Yes, sir.

Q. When did you start to develop the Dan Mac Lease?

A. We put men in there in 1945 and later I took it over in 1946 then it was a short time when we shut down.

Q. It was in operation in 1945 and 1946?

A. Partly in 1945 and partly in 1946.

Q. Was the operation successful?

A. No, they were not, that is why we shut it down. It was getting poorer all of the time.

Q. You mentioned an agreement,—in general what was this agreement, what were you to furnish?

A. My part of it was to run the property that we leased or owned.

Q. And what was Mr. McFee to do? [128]

A. Put up the money.

Q. Did you put up any money?

A. No, sir.

Q. Do you know how much money Mr. McFee put up?

A. No, I haven't any idea at all.

Mr. Patten: You may cross examine.

Mr. Purdy: No questions.

JOHN R. MATTHEWS

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you spell your last name? A. M-a-t-t-h-e-w-s.

Q. Where do you live Mr. Matthews?

A. Wallace, Idaho.

Q. What is your address?

A. 149 King Street.

Q. What is your present business?

A. Employed by the Hecla Mining Company.

Q. What was your business prior to that?

A. I have been with the Hecla Company since I have been in Wallace, that is, since 1937. [129]

Q. Do you know the defendant, Mr. McFee?

A. Yes, I do.

Q. Do you know him intimately?

A. Quite well.

Q. How long have you known him?

A. About 12 years.

Q. Do you recognize Plaintiff's Exhibit No. 8 which was handed to you?

A. Yes, this appears to be a partnership return of income tax for the year 1945.

Q. Does your name appear on it?

A. I have signed it as the person preparing the return.

Q. Is there any other signature on the back of that return?

(Testimony of John R. Matthews.)

A. Yes, Mr. McFee's,—A. F. McFee's signature appears on there.

Q. Do you recognize that signature?

A. I think it is his signature.

Mr. Patten: I offer Exhibit 8 in evidence at this time.

Mr. Purdy: No objections.

The Court: It may be admitted.

Q. Would you further identify that return?

A. It is a partnership return for the year 1945 on the Dan Mac Lease; this was in operation during that year.

Q. From your knowledge and experience can you tell who the partnership was, who were the partners?

A. I am looking at Schedule I; the partners shown on this return are A. F. McFee; Dan Murphy, W. J. Emasio and Ross [130] Roundy.

Q. What income was reported on this exhibit?

A. $28,652.51 loss is shown.

Q. How was that apportioned?

A. Entirely to Mr. McFee.

Q. Why was it so apportioned?

A. The return states the profit and loss to be shared in proportion to the capital investment.

Q. Now, you have been handed Exhibit No. 9 marked for identification, do you recognize that?

A. This appears to be a partnership return for the year ending December 31, 1946, for the Dan Mac Lease.

Q. Is your signature on that document?

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(Testimony of John R. Matthews.)

A. Yes, in the same way as it did on the 1945 return.

Q. You state that it appears to be a partnership return, is there any doubt in your mind about that?

A. I didn't mean to indicate that there was.

Q. What is the other signature on that page?

A. A. F. McFee signed it as being a partner in the same manner as the 1945 return.

Mr. Patten: I offer Exhibit No. 9 in evidence.

The Court: Have you any objections?

Mr. Purdy: No objections.

The Court: It may be admitted.

Q. During 1946 who were the partners in the Dan Mac Lease, or [131] doing business under the name of the Dan Mac Lease?

A. According to the return, A. F. McFee, W. J. Emasio, Dan Murphy.

Q. What profit does the return show?

A. This shows a loss of $24,549.15.

Q. And how was that apportioned?

A. To A. F. McFee.

Q. Does it show why it was so apportioned?

A. The losses apportioned according to the capital investment.

Q. Do you, or rather did you keep the books of the Dan Mac Lease partnership?

A. Yes, sir.

Q. Did you keep those books for the years covered by the returns? A. Yes, sir.

Q. Are those returns in agreement with the books?

(Testimony of John R. Matthews.)

A. I think they are; I haven't the books to see at this time, but I presume that they are.

Q. Was there a capital account in those books?

A. Yes, sir.

Q. Will you explain to the jury just what a capital account is?

A. This was a partnership and the capital account represents the investment of the partnership or rather the investment of the partners in the business or enterprise.

Q. Is that simply the money that has been put in the business plus the earnings? [132]

A. Yes, sir, or minus the losses, it would be the equity in the business.

Q. Did you keep this partnership account?

A. Yes, sir.

Q. Did you post that account? A. Yes, sir.

Q. From what records did you post this account?

A. From whatever sources of entry were available.

Q. And what would those be?

A. The usual source of entry is anything that is for the purpose of recording the financial transactions. The cash receipts book and the cash disbursements vouchers.

A. A proprietorship account?

A. From a summation of the investments plus and minus the profit or loss.

Q. How did you post the investment in the business?

A. Through the cash receipts from the partners.

Q. What piece of paper was this or what pieces

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(Testimony of John R. Matthews.)

of paper were those cash receipts posted from?

A. The deposit tickets.

Q. To the bank? A. Yes, to the bank.

Q. To what bank?

A. I believe that this was kept in the Idaho First National.

Q. Do you recognize Plaintiff's Exhibit No. 21, have you ever seen these records before? [133]

A. No, I never did, these are deposit slips, I didn't make them myself, I might have seen copies of those.

Q. Have you seen copies of them?

A. Yes, I believe I have.

Q. Copies of those,—were they the records from which you posted this proprietorship account?

A. Yes, sir.

Mr. Patten: I want to offer this exhibit in evidence at this time.

The Court: If there is no objection it will be admitted.

Q. Can you run through those records and read them including the description of the funds deposited, whether it was a check or currency. Give us the date, the amount, and the description.

A. The first one is dated February 1, 1945, Dan Mac Lease 303 6th Street; A. F. M. 10927 and that is for $1,000.00. The next is dated February 23, 1945, with no notation on it and it is in the amount of $500.00. Here is another dated March 17, 1945, for $2,000.00 and that amount appears opposite the word "currency," the next is April 7, 1945, for

(Testimony of John R. Matthews.)

$2,000.00 opposite the word "currency," the next is May 2, 1945, for $2,000.00 opposite the word "currency," June 4, 1945, $2,000.00 "currency," next is June 15, 1945, $2,000.00 opposite the word "currency," the next is July 10, 1945, $1,000.00 opposite the word "currency"; the [134] next is July 17, 1945, $1,000.00 opposite the word "currency"; the next is July 28, 1945, that is for $2,000.00 opposite the word "currency"; the next is August 14, 1945, opposite the word "currency" $2,000.00; the next is September 6, 1945, currency, $1,000.00; the next September 19, 1945, that appears to be opposite the letter "T" for $2,000.00 that is not opposite the word "currency." Here is one dated September 28, 1945, currency $2,000.00; the next is October 5, 1945, on that deposit slip are the numbers 93-29 and opposite that is $1,556.84 opposite the numbers 93-29 is $698.56 for a total of $2,255.40; the next is October 27, 1945, apparently that is not currency it is in the amount of $3,000.00; the next is November 7, 1945, opposite the word "currency" $2,000.00; the next is November 13, that is apparently another transit check the numbers 1-74, that is for $172.98; the next is December 4, 1945, that bears an initial of some kind I cannot read it, $4,800.00. The next one is currency dated January 30, 1946, that is for $1,600.00; the next is February 20, 1946, currency $2,000.00; the next February 23, 1946, with the letter "T" $1,800.00; the next is dated March 4, 1946, it has the letters A. F. and R. number 93-29 that is for $624.49; the next one

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(Testimony of John R. Matthews.)

is dated March 16, 1946, with the letter "T" $1,183.35; the next is March 30, 1946, currency $1,000.00; the next one is dated April 4, 1946, currency $1,500.00; [135] the next one April 13, 1946, that has the letter "T" $131.48; the next one is dated April 16, 1946, and there is an item of $69.20 that item does not seem to be currency or silver; the next one is April 25, 1946, currency $800.00; and the next is May 6, 1946, currency $1,450.00. Here is one for May 20, 1946, apparently that is currency $500.00 and another item of $9.13 a total of $509.13; the next one is January 5, 1946, currency $1,900.00; the next one is dated June 24, 1946, for $1,000.00; the next one is July 1, 1946, that has the letter "T" for $72.50.

Q. How many more are there in this exhibit?

A. I would say about 20.

Mr. Patten: May I submit them to the jury?

The Court: You may do so.

Q. What are the items in these documents. Did you handle the items marked currency, if so how were they handled on the books?

A. I believe that I credited all of the investment to A. F. McFee.

Q. The odd amounts, that have other identification marks beside currency there, what was done with them?

A. Those would be miscellaneous receipts, most of it was ore returns,—they made a few ore shipments.

Mr. Patten: I believe you may cross examine.

(Testimony of John R. Matthews.)

Mr. Emigh: May we defer this cross examination until we examine the exhibits? [136]

The Court: You may look at the exhibits at this time and we will go ahead with the cross examination.

Mr. Emigh: I have no examination at this time of this witness.

The Court: I think that if the trial is to proceed in an orderly manner he should be cross examined at this time but you may call him later as your witness if you find that you want him later.

Mr. Emigh: Very well, we have no cross examination at this time.

RAY F. OLSEN

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Where do you reside, Mr. Olsen? A. Provo, Utah.

Q. How long have you resided in Provo, Utah?

A. Four months.

Q. Where did you reside before you resided in Provo? A. Coeur d'Alene.

Q. What is your occupation?

A. Internal Revenue Agent. [137]

Q. How long have you been such Internal Revenue Agent? A. Approximately 10 years.

Q. Continually?

A. I was in the Army four years.

Q. And what is your education?

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(Testimony of Ray F. Olsen.)

A. I graduated from the University of Utah.

Q. Are you an accredited accountant in Idaho?

A. A C.P.A. in Idaho, yes.

Q. Have you examined any books belonging to a partnership known as the Dan Mac Lease?

A. Yes, sir.

Q. When did you examine those records?

A. Well, that was about,—1948.

Q. Who furnished those records for you to examine? A. John Matthews.

Q. Did you examine any particular proprietorship account in 1945 and 1947, or rather for those years? A. Yes.

Q. What does the proprietorship account show?

Mr. Emigh: We object to this as incompetent, irrelevant and immaterial, the account is in Court and made available for inspection.

The Court: I understand that those are in your possession, you may cross examine him on those matters, if you desire. I believe at this time it is time for adjournment now and we will recess until tomorrow morning at 10:00 o'clock. [138]

April 25, 1952, 10:00 o'clock a.m.

The Court: You may answer that question, Mr. Olsen.

A. The proprietorship account represents the investment of any individual in the property and shows his withdrawals, shows his ownership in any given endeavor.

Q. What was this account called in the books of the Dan Mac Lease?

(Testimony of Ray F. Olsen.)

A. A. F. McFee Investment.

Q. Does that show how much Mr. McFee invested in the Dan Mac Lease? A. Yes, sir.

Q. How much was that amount?

A. $30,300.00.

Q. Have you also examined the drawing accounts of the North Idaho Sales Company?

A. Yes, sir.

Q. How much of this total investment did you find withdrawn from the North Idaho Sales Company? A. $1,500.00.

Q. How was the remainder of the investment accounted for?

A. Through deposits of currency in the Idaho First National.

Q. Are these the deposits to which you have reference?

A. Yes, sir. I have checked these, and I have checked the records. [139]

Q. How much money did Mr. McFee put in the Dan Mac Lease in 1946? A. $21,250.00.

Q. How was this investment made?

A. Through deposits in the Idaho First National.

Q. Did you check the drawing account at the North Idaho Sales Company? A. Yes, sir.

Q. Did any of this investment come out of the North Idaho Sales Company? A. No, sir.

Q. And the investment in 1946, did you ever check against either this Exhibit No. 21 or the duplicates of those tickets?

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(Testimony of Ray F. Olsen.)

A. I checked against the duplicates.

Q. In whose possession were those duplicates?

A. John Matthews.

Q. You have Exhibits 1 and 2; would you turn to the attachments which relate to Schedule F, page two? A. Yes, I have it.

Q. The partnership section of the return, what partnerships are listed there,—which exhibit do you have now? A. I have Exhibit 1.

Q. Which partnerships are listed?

A. The Dan Murphy Lease and the Dan Mac Lease.

Q. Does your present testimony relate in any way to the Dan [140] Murphy Lease?

A. No, sir.

Q. Are these entirely different and separate ventures? A. They are separate.

Q. Have you examined the record of the Dan Murphy Lease? A. Yes, sir.

Q. Where did the investment in the Dan Murphy Lease come from?

A. The drawing account of the North Idaho Sales Company.

Mr. Patten: You may cross examine.

Cross Examination

Q. (By Mr. Purdy): The books of the North Idaho Sales Company and the income tax returns were correct as far as the records of the North Idaho Sales Company were concerned for the years 1945 and 1946?

(Testimony of Ray F. Olsen.)

A. The income as shown on the books and these returns?

Q. Yes. A. They agree.

Q. For those two years? A. Yes, sir.

Mr. Purdy: That is all.

Mr. Patten: That is all. [141]

FRED SCHWENK

Having heretofore been called as a witness and having been sworn testifies as follows:

Direct Examination

Q. (By Mr. Patten): You have previously told us your address? A. Yes, sir.

Q. What was your business during the years 1945 and 1946? A. Lumber business.

Q. What was the name of that lumber company?

A. Sonduck and Schwenk.

Q. Was this a corporation or a partnership?

A. A corporation from the spring of 1945.

Q. Who were the stockholders?

A. J. L. Sonduck, Sidney Sonduck and myself.

Q. What was your position in the company?

A. Director, secretary and treasurer.

Q. How was this corporation financed?

A. Through loans that Mr. Sonduck secured for the corporation.

Q. From whom did Mr. Sonduck secure those loans? A. From Mr. McFee.

Q. Would you tell us the first loan Mr. Sonduck obtained in 1945 if you know, from Mr. McFee?

A. I have a schedule here.

(Testimony of Fred Schwenk.)

Q. Would that refresh your memory, according to this it was on [142] 26th of January, 1945, for the amount of $4,500.00, on the 14th of February, $1,000.00, on March 10, $2,000.00, March 15, $2,-500.00; March 30, $1,000.00; April 17, $1,500.00; April 24, $500.00; May 25, $14,500.00.

Q. What is the total?

A. $27,500.00 at that time.

Q. What, if anything, happened about that time in reference to those loans, were they handled any differently after that?

A. As I understood there was a note and chattel mortgage given by Mr. Sonduck to Mr. McFee.

Q. Was that by the corporation or Mr. Sonduck?

A. Mr. Sonduck personally.

A. At that time there was a total of how much?

A. Well there was another loan of $2,500.00 on the 8th of June and the last total was $30,000.00.

Q. At that time something happened?

A. Yes, a chattel mortgage issued to Mr. McFee from Mr. Sonduck.

Q. And who else?

A. Just Mr. Sonduck, that was a personal obligation at that time.

Q. Now the next transaction?

A. On the 9th of June an additional $1,000.00 and several after that, but that is all a matter of record.

Q. Can you give the loans at that time?

A. On June 9th,——

(Testimony of Fred Schwenk.)

Q. ——Refresh your memory and give the dates and amounts.

A. The 9th of June, $5,000.00. [143]

The Court: Is this in 1946?

A. No. 1945,—June 27th, $1,500.00; July 7th $1,500.00; July 23, $1,000.00; July 28, $2,000.00; September 28, $1,000.00.

Q. Is that the last loan during 1945?

A. According to my recollection and the schedule that I have.

Q. What was the total of the loans in 1945?

A. As I have it, $39,613.06.

Q. What if anything transpired at that time?

A. Well I,—Shortly after that,—I don't know that I should say shortly thereafter but thereafter all of the obligations were consolidated in one amount, $42,000.00, a chattel mortgage by the corporation was given to Mr. McFee absolving Mr. Sonduck of his individual liability.

Q. Did the corporation borrow any funds from Mr. McFee during 1946?

A. According to this, there was just one loan of $1,500.00.

Q. Did Mr. Sonduck or the corporation make repayments on those loans in 1945 or 1946?

A. In 1946 there was approximately,—first in 1945 $1,000.00 repaid and in 1946 a little over $2,500.00.

Q. How was the $2,500.00 repaid during 1946?

A. Some material was sold to him by the cor-

(Testimony of Fred Schwenk.)

poration and worked on this and the transportation cost.

Q. No money?

A. Except the corporation advanced money for the material that was sold to McFee. [144]

Q. Is your memory that the corporation furnished building material to Mr. McFee?

A. That is right.

Q. The $1,000.00, that was cash?

A. Yes, a cash payment.

Q. In the course of your testimony you have referred to the paper in your hand, will you tell the jury what that is?

A. A schedule of all of the transactions between Mr. Sonduck and Mr. McFee and subsequently the corporation and McFee; all of the loans and all of the repayments up until the 29th of March, 1948.

Q. Have you ever discussed the figures on that paper with Mr. McFee?

A. No, but I have with his accountants.

Q. Did you and his accountants agree that they were correct? A. Yes, sir.

Mr. Patten: I believe that you may cross examine.

Mr. Purdy: No questions.

JOSEPH L. SONDUCK

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows: [145]

Direct Examination

Q. (By Mr. Wilson): Where do you reside?

A. East 10420 Empire Way, Spokane.

Q. How long have you lived in Spokane?

A. About 15 years off and on.

Q. Are you acquainted with the defendant, Mr. McFee? A. Yes, sir.

Q. How long have you known him?

A. About nine years.

Q. And you had some business dealings during that time? A. Yes, sir.

Q. Do you know him socially quite well also?

A. Yes, sir.

Q. During 1945 and 1946 did you borrow any money from Mr. McFee? A. I did.

Q. Do you recall the total amount?

A. I never kept it in my mind as to the different loan at different times but all told about $42,000.00.

Q. How much of that $42,000.00 did you get in 1944,—on my previous question did I ask if you borrowed in 1944, '45 and '46?

A. I believed that you mentioned '45 and '46.

Q. I intended to include '44,—how much of the $42,000.00 did you get in 1944?

A. None repaid in 1944, it was in the neighborhood of about $5,000.00, maybe more or less.

Mr. Emigh: That was in 1944? [146]

A. Yes.

(Testimony of Joseph L. Sonduck.)

Q. Then the difference between that figure and $42,000.00, that balance was in 1945 and 1946?

A. That is correct.

Q. You have been handed Plaintiff's Exhibit No. 37, marked for identification, this purports to be a photograph taken of some instrument, can you identify that? A. Yes, sir.

Q. Do you know where the original of that is?

A. The last I saw of the original was in Mr. McFee's office.

Q. Do you know from where the original came?

A. That was a statement made at the office of Mr. McFee as to the amount owing Mr. McFee, that was a mutual statement between us to arrive at the amount from the notes.

Q. The original was taken from McFee's books?

A. That is correct.

Q. You will notice the signature,—there are two on this document? A. Yes.

Q. Do you recognize them?

A. My signature is there.

Q. Anybody else? A. Mr. McFee.

Q. Did you see Mr. McFee sign that document?

A. Yes.

Mr. Wilson: I would like to offer this in evidence.

Mr. Purdy: We have no objection. [147]

The Court: It may be admitted.

Q. Now, during the years 1945 and 1946 when you received these loans from Mr. McFee how were they made, by check, or money,—currency?

(Testimony of Joseph L. Sonduck.)

A. Currency and some checks.

Q. In proportion how many checks and how much in currency?

A. I really could not tell.

Q. Could you tell by examining the exhibit?

A. That would not tell me anything.

Q. Can you give the Court and jury some estimate?

Mr. Purdy: We object to that, the witness has already said he cannot tell and this could be nothing but a guess. We object to it as a conclusion of the witness and not a matter of his own knowledge at this time.

The Court: Yes, I think possibly the way he answered before that it would be a guess. If he can tell how much he received in currency, he may answer.

Q. Can you tell about how much you received in currency?

A. Truthfully I cannot say how much I received in currency.

Q. When you did receive it in currency, what were the denominations of the bills?

A. Well, there would be some 50's, some 10's and 20's.

Q. Will you explain what these figures are on this exhibit?

Mr. Purdy: I think possibly the exhibit is the best evidence and I object to this. [148]

The Court: He may explain any figures that they want him to explain.

POOR COPY

(Testimony of Joseph L. Sonduck.)

A. Well, here (indicating) in 1945 it says "balance brought forward $30,000.00" then it says "note due 7-15-45, $5,000.00," on June 27, 1945, note due $1,500.00, July 7, note due 8-7-45 $1,500.00, July 23 note due August 23, 1945, $1,000.00, July 28, note due August 28, 1945, $2,000.00; September 28, note due March 28, 1945, $1,000.00.

Q. Are those separate loans?

A. Yes, each a separate loan.

Q. How many loans are indicated on the exhibit during 1945 and 1946? A. Eight loans.

Q. Totalling how much as indicated on the exhibit? A. You want the grand total?

Q. Yes. A. $42,113.06.

Q. There are three smaller items?

A. Yes, sir.

Q. That is the amount you borrowed from Mr. McFee? A. Yes, sir.

Q. What is the date of that exhibit?

A. October 12, 1945.

Q. I am now referring to Exhibit No. 37 and it indicates here on January 4 note—Lewiston in the sum of $1,000.00, do you recall that? [149]

A. Yes, sir.

Q. Will you tell the Court about that?

A. Mr. McFee directed a club at Lewiston which he owned or had an interest in to pay me $1,000.00.

Q. How did you get that, who gave it to you?

A. The manager of the club gave me the money.

Q. In check or in cash? A. In cash.

Q. Was it currency? A. Yes, sir.

(Testimony of Joseph L. Sonduck.)

Q. There is marked on here "Deac-transfer" what does that mean?

A. Unless it is a transfer from Wallace to Spokane, I don't know.

Q. And that is in the sum of $1,000.00?

A. Yes.

Q. Who was Deac?

A. I don't know unless it was Dick Jones.

Q. How did you receive that money?

A. Transferred from Wallace to Spokane.

Q. There is also on this exhibit "Helen—12,20,44 $1,000.00," do you recall that?

A. No, I cannot recall that.

Q. Here is another, "Out of pocket 1-4 $500.00"?

A. Yes, I borrowed that from McFee.

Q. How did you receive that, was it a check or money? [150] A. I don't remember.

Q. Now, on February 14, 1945, note on demand, $1,000.00, do you recall that? A. No, I cannot.

Q. You have examined this exhibit?

A. Yes.

Q. Are the figures correct according to your knowledge? A. Yes, sir.

Q. That indicates the balance owing to Mr. McFee of $7,000.00 at that time, would you say that was correct?

A. No, I don't say that because I don't know.

Q. That is as of February 14, 1945?

A. If it is on the statement it must be so, everything was kept in the office, yes.

(Testimony of Joseph L. Sonduck.)

Q. March 10, 1945, note on demand $2,000.00, do you recall that?

A. It must be so, it is on the record.

Q. Do you recall how you received that?

A. No, I cannot recall.

Q. How did you happen to get this money, did you call him on the telephone?

A. I would make a trip to Wallace or call him on the 'phone.

Q. And where did you meet him when you made the trip to Wallace? A. At his office.

Q. Where did Mr. McFee get the money to give you? A. I don't know. [151]

Q. You didn't notice that? A. No, sir.

Q. Would you go to the bank?

A. At times he would go to the bank and at times he had it in the safe.

Q. Do you recall meeting him at a tavern in Wallace and getting some money from him in a tavern there in Wallace?

A. No, I don't recall that.

Q. And now, on March 15, 1945, this record shows note, on demand, $2,500.00, do you recall that?

A. Is it on the copy?

Q. I am reading from the copy to you.

A. Yes, sir.

Q. This indicates that you owe a balance of $11,500.00, you don't recall that?

A. No, I don't recall that.

The Court: You say that you don't remember whether you received $2,000.00 in cash or in a

(Testimony of Joseph L. Sonduck.)

check or how you got it. Now, I want you to tell counsel and the Court what you remember. You don't remember whether you received $2,000.00 in currency or a check? A. No, I cannot say.

The Court: Very well, you may proceed with your examination.

Q. Now, follow me on the left side again the word "Deac transfer," [152] $1,500.00, it says "given Deac for transfer?"

A. I cannot recall but it must be a transfer from Wallace to our bank in Spokane.

Q. Do you recall how it was made, whether you went to the bank with Mr. McFee or how?

A. It appears to me that I called him and he transferred that amount.

Q. On April 24, cash $500.00 do you recall obtaining that money from Mr. McFee, do you see it there? A. Yes I see it, April 27.

Q. No—April 24, do you recall that?

A. Yes, I do.

Q. Where were you at that time?

A. I cannot recall where that transaction took place.

Q. Do you recall how you received payment?

A. Yes, I think I do.

Q. How was that? A. In cash,—currency.

Q. Took it out of his pocket and handed it to you? A. That is right, yes, sir.

Q. Now, the next is May 5, and the figure is $14,500.00? A. That is right.

Q. Where did you negotiate that loan?

BLEED THROUGH POOR COPY

(Testimony of Joseph L. Sonduck.)

A. In McFee's office.

Q. How did you receive payment at that time?

A. Currency. [153]

Q. Cash?

A. Yes, sir, that was paid in currency.

Q. What was the denomination of those bills?

A. They were various denominations, $50's, 20's and 10's.

Q. What would you say most of them were?

A. I cannot say.

Q. The next item indicates it was on June 4, it says "cash—Lewiston $100.00," do you recall that? A. Yes, sir.

Q. Where were you at that time?

A. We were at Lewiston.

Q. Did you give any security or collateral?

A. Yes, sir.

Q. What? A. Notes.

Q. Unsecured?

A. They were later secured by a mortgage.

Q. June 5, cash,—Lewiston, $500.00 now that seems to be the next day, do you recall that?

A. I don't recall the time and the place but I know it has been paid, that is we got it.

Q. Was it at the club?

A. I don't remember.

Q. Now, the next one indicates that it was on June 8th, that was cash at Wallace, Idaho, according to this record, $400.00?

A. It appears that these items were taken in these small amounts [154] and were later incor-

(Testimony of Joseph L. Sonduck.)

porated into one note of a $1,000.00 that would make $1,000.00.

Q. Did you have any money from Mr. Sherman at the Foresters Club in Wallace? A. No.

Q. I mean the Foresters Club in Coeur d'Alene?

A. Yes.

Q. Can you identify those items as being received from Sherman? A. No, I cannot.

Q. How did it happen that you received money from Sherman at Coeur d'Alene?

A. Mr. McFee instructed Sherman to give me the money.

Q. How was that money given to you?

A. In currency.

Q. The next item is under date of June 9th and is in the sum of $5,000.00, can you recall that incident? A. I recall the incident.

Q. Did you receive check or cash?

A. I would not say whether it was all or a part cash.

Q. Do you remember where it was that you received it?

A. Those large loans were made at Wallace.

Q. Mr. McFee gave it to you personally?

A. I couldn't say about that.

Q. If he didn't then who was it?

A. It was with Mr. McFee's knowledge, I know, but it could be the bookeeper, lots of times I received money from the [155] bookkeeper.

Q. How did you receive it at that time from the bookkeeper, was it check or currency?

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(Testimony of Joseph L. Sonduck.)

A. Currency.

Q. It was always currency?

A. That is right.

Q. All of the money you received, you received in currency up to that time? A. Yes, sir.

Q. On July 7th a note indicating the sum of $1,500.00, do you recall that?

A. I don't recall the incident.

Q. The record indicates that the balance owed at that time was in the sum of approximately $38,000.00? A. Yes, sir.

Q. That is, the record shows the balance to be $38,000.00. A. Yes.

Q. The next item was on July 23rd, and that was in the amount of $1,000.00?

A. That is right.

Q. Do you recall where you were when you got that money and from whom you got it?

A. No, I can't.

Q. The next is on July 28th and the amount is $2,000.00? A. Yes, sir.

Q. Do you recall where you got that money?

A. That was at Wallace.

Q. Do you recall who gave it to you?

A. No.

Q. Was it in cash or by check?

A. I cannot say that either.

Q. The next item is September 28th, $1,000.00, do you recall anything about that?

A. I know it was borrowed but I cannot recall the particulars about the loan.

(Testimony of Joseph L. Sonduck.)

Q. I wonder if you could read from the exhibit and give us the balance at the beginning of the year 1945? A. Well, there is——

Q. ——I believe you said that it showed about $5,000.00 or I believe you said that was the balance that you owed at that time,—doesn't the exhibit show $2,500.00, there are two copies, I don't know which one you are referring to, if you will look at the third line on the first page?

A. Yes, I see it, I am a very poor bookkeeper.

Q. In other words, at the beginning of 1945 you owed only $2,500.00?

A. According to the record, that is right.

Q. And the record, of course, is correct?

A. Yes, sir.

Q. How much did you get from Mr. McFee in 1946 that is on that record?

A. I don't recall. [157]

Q. You have been shown another paper?

A. March 10, 1946, $1,500.00.

Q. Did you get any other money except that from Mr. McFee?

A. I cannot say, I don't remember.

Q. Did you get that $1,500.00?

A. Yes, sir.

Q. Will you read the balance that you have on Exhibit No. 37, for the total amount that owed McFee for the year 1945? A. $42,113.06.

Q. Now, did you ever repay this money to McFee? A. Yes.

Q. When?

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(Testimony of Joseph L. Sonduck.)

A. In 1948, I sold a piece of property and there was $20,000.00 or so applied on his account.

Q. Did you repay any money at all during 1945 or 1946?

A. I don't know, I didn't keep track of the office work, I was very little in the office.

Q. The date of Exhibit No. 37 is in October, that is what date? A. October 12, 1945.

Q. And nothing had been paid at that time?

A. No.

Q. Was anything paid between October 12, 1945, and December 31. A. I cannot say.

Q. I might hand you this to refresh your memory.

A. There is a check dated December 20, 1945, for $1,000.00. [158]

Q. Is that your check?

A. That is my signature.

Q. What was that for, what was the money used for?

A. It must have been,—let me see——

Q. ——Didn't you give it to Mr. McFee?

A. Well——

The Court: You are not a very willing witness, are you?

A. Well, yes I did.

The Court: You are not a very willing witness, you really didn't want to come and testify for the government.

A. That is what I am here for.

(Testimony of Joseph L. Sonduck.)

The Court: Did you come willingly, were you subpoenaed?

A. I was subpoenaed.

The Court: You are friendly with the defendant?

A. We are casual acquaintances.

The Court: You say that you had borrowed this amount, this large amount of money.

A. I will explain this, I spent all my time at the mill and I cannot recall the transactions.

The Court: You are trying to remember what took place, are you?

A. I am trying to remember.

The Court: You can't remember what you did with the $1,000.00, an item of that size?

A. I really can't, there is a check of $1,000.00 I cashed myself, [159] it has my endorsement but I have no recollection of it.

Q. Referring to Plaintiff's Exhibit No. 37, that long list of loans that you received; do you recall any of them that you received by check, can you pick anyone out and tell us you got that by check?

A. There was a transaction that Mr. Fee gave stock, that was incorporated in these notes, he gave 3,200 in stock to sell, I presume that he was short of money.

Q. You sold it and got the money?

A. Yes, sir.

Q. Outside of that can you now think of any time that you were paid by check?

A. Another instance we got a check through the mail from Wallace.

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(Testimony of Joseph L. Sonduck.)

Q. What year was that?

A. 1945 or 1946.

Mr. Wilson: I believe you may cross examine the witness.

Cross Examination

Q. (By Mr. Purdy): Where is your mill located? A. Located at Almond and Euclid.

Q. Do you have a mill in central Idaho? [160]

A. Yes, I did have.

Q. What year was it you had the mill in central Idaho? A. In 1944.

Q. It remained there through 1946?

A. Yes,—no, it was through 1945.

Q. Now, in regard to some of those loans you were getting from Mr. McFee, do you recall of having phoned him from Lewiston for money?

A. Yes.

Q. And at that time did he direct you to go to Lewiston and get it from the Foresters Club?

A. Yes, sir.

Q. And that happened on more than one occasion? A. On two occasions.

Mr. Purdy: That is all.

Mr. Wilson: That is all.

FRED SCHWENK

Recalled as a witness by the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Could you tell us when

(Testimony of Fred Schwenk.)

Sonduck and Schwenk Lumber Company [161] received the stock and sold it and received cash?

A. May I look at the schedule?

Q. You may.

A. It says 1948, I recall that it was in the Fall, early in the Fall of the year.

Q. Do you recall what that stock was?

A. Sunshine Consolidated.

Mr. Patten: You may cross examine.

Cross Examination

Q. (By Mr. Purdy): Did you say 1948?

A. Yes, sir.

Mr. Purdy: Then we ask the testimony concerning that be stricken; that does not come within the confines of the bill of particulars and it is not within the confines of the charge here.

The Court: The motion is denied.

Mr. Emigh: May that go to the testimony of the other witness concerning this transaction?

Mr. Patten: I simply called this witness to correct an error. It does not relate to the time involved here.

The Court: Then you don't care about this testimony?

Mr. Patten: No, your Honor.

The Court: Then it may be stricken. [162]

The Court: We will take a recess at this time for 15 minutes.

April 25, 1952, 11:15 a.m.

GEORGE McINTOSH

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Your name is George McIntosh? A. George P. McIntosh.

Q. Will you spell your last name?

A. M-c-I-n-t-o-s-h.

Q. Where do you live?

A. Spokane, Washington.

Q. What is your address?

A. My office is 417 Simmons Building.

Q. What is your business?

A. Certified Public Accountant.

Q. And are you familiar with the corporation known as the Sonduck-Schwenk Lumber Company?

A. Yes, sir.

Q. We requested you to bring certain records with you? [163] A. Yes, sir.

Q. And you have them?

A. Yes, sir, I have them in my brief case.

Q. Will you get them? A. Yes, sir.

Q. What is the book that you have in your hand which is marked as Plaintiff's Exhibit No. 38?

A. That is the general ledger of Sonduck and Schwenk Lumber Company.

Q. The last piece of paper, will you turn to the loans payable ledger sheet? A. Yes, sir.

Q. Is the piece of paper that you have in your

(Testimony of George McIntosh.)

hand a correct copy of the accounts payable ledger as it appears in the account of the corporation?

A. Yes, sir.

Mr. Patten: I would like to offer this piece of paper as Exhibit No. 38 with the opportunity given to counsel to compare it with the accounts.

The Court: Is there any objection to that?

Mr. Purdy: We have no objection.

The Court: Then it may be admitted.

Mr. Patten: The witness is submitted for cross examination.

Mr. Purdy: We have no cross examination at this time. [164]

CARL RODGERS

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you spell your name?

A. R-o-d-g-e-r-s.

Q. What is your business, Mr. Rodgers?

A. Treasury Agent,—Internal Revenue Agent.

Q. How long have you been so employed?

A. Since 1935.

Q. Do you know the defendant in this proceeding? A. Yes, sir.

Q. When did you meet Mr. McFee?

A. I think it was in 1938, I was examining one of his tax returns.

Q. Can you place that date closer if you can?

(Testimony of Carl Rodgers.)

A. Well it was about January the 13th, 1938.

Q. Where did you meet him?

A. In his place of business in Wallace.

Q. In what connection did you meet Mr. McFee?

A. In connection with the examination of his 1936 income tax return.

Q. Did you discuss any other returns at that time? [165] A. Not at that time.

Q. Was that an individual tax return of Mr. A. F. McFee?

A. It was, and also a partnership return.

Q. What partnership?

A. North Idaho Sales Company.

Q. Do you recall Mr. McIntosh, did Mr. McFee tell you when that partnership was organized?

A. My recollection is that he did; I questioned him about that and my recollection is that it was on January 1, 1936.

Q. And who were the partners?

A. Mr. McFee and Dorothy McFee, his daughter.

Q. Did Mr. McFee tell you with what capital they started this business?

A. Either Mr. McFee or his daughter, I don't recall which one it was but I did inquire as to the capital and the services contributed to this partnership.

Q. In the conversation that you mentioned with his daughter was Mr. McFee present at this conversation?

A. I don't think he was when I talked to his daughter.

Q. Will you tell us what Mr. McFee said in any conversation that you had with him?

(Testimony of Carl Rodgers.)

Mr. Purdy: We object to that as no time or persons present have been fixed.

The Court: You may fix the persons present.

A. At the time you were talking to Mr. McFee who else was present? [166]

A. I don't think any one else was present at that time, not that I recall.

Q. Did Mr. McFee tell you what capital he started this business with?

A. He did, as I recall.

Q. What was the amount of this capital investment?

A. I think it was about $700.00 or $800.00, it was less than $1,000.00.

Q. Did he tell you his daughter had any money in the business? A. Yes, he did.

Q. What was her interest?

A. It was the same as his, equal partners.

Q. And what was the total investment in the business?

A. It was less than $2,000.00,—it was around $1,500.00.

Q. Did you have with you the partnership return of A. F. McFee and Dorothy McFee?

A. Yes, I did.

Q. And did you have with you the individual return of A. F. McFee? A. Yes, sir.

Q. And both of those related to the calendar year 1936? A. Yes, sir.

Q. Will you tell the jury what income was reported on the partnership return?

(Testimony of Carl Rodgers.)

A. The total income reported on the partnership return for the year 1936, the net income, was $3,009.23. [167]

Q. Of what did that income consist?

A. It consisted of receipts from slot machines,—amusement devices, vending machines.

Q. Any other income on the partnership return?

A. There was an item listed as salary paid to Mr. McFee.

Q. And what was the amount of that?

A. That amount was $910.00.

Q. Where did he earn that salary?

A. At the Green Grocery at Kellogg, Idaho.

Q. And does the return tell from what date he was employed? A. The return didn't say.

Q. Did you ask Mr. McFee? A. I did.

Q. What did he tell you?

A. January 1, 1936, to July 1, 1936, at $35.00 a week.

Q. You mentioned that the total net income reported by the partnership of A. F. McFee and Dorothy McFee was $3,009.23; does that include the $900.00 or the $910.00 that you mentioned?

A. It does.

Q. What income was reported on the individual return of A. F. McFee?

A. He reported a total income of $1,504.62.

Q. What was the source of that income?

A. The North Idaho Sales Company.

Q. What portion of that was from that source? [168] A. All of it.

(Testimony of Carl Rodgers.)

Q. And the portion of Mr. McFee's report is what part of the total report by the North Idaho Sales Company? A. Exactly one-half.

Mr. Patten: I intend to proceed to another year at this time, I am wondering if the Could would rather have the cross examination as to this year?

The Court: No, you go right ahead.

Q. Did you meet Mr. McFee at a subsequent date? A. Yes, sir, I did.

Q. And what date was that?

A. That was about July 3, 1941.

Q. And in what connection did you meet him at that time?

A. That was in connection with an examination of the North Idaho Sales Company and A. F. McFee and Dorothy McFee income tax returns for the year 1939.

Q. Did you have the original tax returns of the North Idaho Sales Company in your possession at that time? A. Yes, sir, I did.

Q. What was the net income reported on that return? A. $18,362.27.

Q. Did you have the individual return of A. F. McFee? A. No, I did not.

Q. According to the partnership return, who were the partners of the North Idaho Sales Company, or was it entitled the North Idaho Sales Company? [169]

A. It was entitled A. F. McFee and Dorothy McFee Partnership.

(Testimony of Carl Rodgers.)

Q. How was the earnings shown on the partnership return distributed?

A. They were shown 50% to A. F. McFee and 50% to Dorothy McFee equally, divided.

Q. The first conversation with Mr. McFee did he tell what occupation he had or how he was employed at the Green Grocery? A. No, sir.

Mr. Patten: You may cross examine.

Cross Examination

Q. (By Mr. Purdy): Did you check his returns against his books?

A. I did for the year 1939.

Q. Did they correspond?

A. Yes, sir, they did.

Mr. Purdy: That is all.

Mr. Patten: Yes, that is all.

H. R. McINTYRE

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows: [170]

Direct Examination

Q. (By Mr. Patten): Will you spell your name?

A. M-c-I-n-t-y-r-e.

Q. And what is your address?

A. 815 Garden, Coeur d'Alene, Idaho.

Q. What is your business?

A. Internal Revenue Agent.

Q. How long have you been such Internal Revenue Agent? A. 30 years.

(Testimony of H. R. McIntyre.)

Q. How long here in Coeur d'Alene?

A. Since 1926.

Q. Do you know the defendant in this proceeding? A. I do.

Q. Mr. A. F. McFee, sitting there at the table?

A. Yes, sir.

Q. When did you first meet Mr. McFee?

A. About 1939.

Q. In what connection did you meet him?

A. Making an examination of his income tax return.

Q. For what year did you make those examinations?

A. For 1937, 1938, 1940 and 1941.

Q. Did you have the original returns of A. F. McFee's for those years?

A. I did for 1937, also 1938 and 1940 but not 1941.

Q. You didn't have it for 1941?

A. No, sir.

Q. Did you have the original returns for the partnership sometimes [171] referred to or known as North Idaho Sales Company, composed of A. F. McFee and Dorothy McFee?

A. For those same years, you mean?

Q. Yes, did you have those returns for 1937?

A. Apparently not.

Q. Did you have the return for 1938?

A. No,—Yes, I did for 1938.

Q. And did you have the returns for 1940?

A. Yes, sir, and also for 1941.

(Testimony of H. R. McIntyre.)

Q. Mr. McIntyre, you stated that you had the individual return of A. F. McFee for the year 1937, what income is shown on that return?

A. $2,918.71.

Q. And what is the source of that?

A. I want to make a correction, he showed a loss of $81.29, I was on another figure when I gave you the answer.

Q. The figure shows on the return was what?

A. A loss of $81.29.

Q. From what business did the return of Mr. McFee figure this loss?

A. His partnership income with other deductions that did not show in detail.

Q. You didn't have the partnership return for the year 1937?

A. No, I don't think I did for 1937.

Q. Did you discuss the return with Mr. McFee?

A. Yes, sir. [172]

Q. Do you recall the date of that conversation?

A. Well, that was about April 22, 1939.

Q. Who else was present at that conversation, if anyone?

A. I don't know, but I think that Mr. Hoover had something to do with those returns; I am not sure that he was there at that time.

Q. Did Mr. McFee tell you the source of his income in 1937? A. No, sir.

Q. What did you get the information from?

A. We picked it up from the books.

Q. Did you examine the books of the North

(Testimony of H. R. McIntyre.)

Idaho Sales Company for the year 1937?

A. Yes, and whatever data was available.

Q. What income was shown on the books of the North Idaho Sales Company for 1937, if any?

A. Not having that partnership return I cannot tell you. Not having it to refresh my memory, I cannot tell for that year.

Q. Did you make any adjustment for that year?

A. Yes, sir.

Q. On what basis did you make this adjustment?

A. From data that I discovered at the time of the examination.

Q. And what was that data?

A. Records in his office.

Q. Were those records of individual earnings?

A. We checked with the partnership and found that they coincided and we made no change or adjustment, the only adjustment [173] was to his personal income.

Q. And what was his personal income as shown on the return? A. One-half of that return.

Q. And what was the income figure?

A. $81.29.

Q. Profit or loss? A. Loss.

Q. Referring to the year 1938, did you have the A. F. McFee individual return with you at that time? A. Yes, sir.

Q. Did you have the individual returns consisting of the partnership of A. F. McFee and Dorothy McFee? A. Yes, sir.

Q. Can you tell us what the income was re-

(Testimony of H. R. McIntyre.)

ported on the return of A. F. McFee?

A. Yes, $3,171.80.

Q. And what was the income on the original return of the partnership? A. $6,343.60.

Q. Now, referring to the year 1940, at the time that you contacted Mr. McFee, did you have the original returns for the year 1940? A. I did.

Q. And what income was reported on the individual return of Mr. McFee for the year 1940?

A. $11,986.52. [174]

Q. What income was reported on the original return of the partnership composed of A. F. McFee and Dorothy McFee? A. $36,207.51.

Q. Is that the figure which was reported on the original return, will you look at that please?

A. No. It is not, it was $23,973.04.

Q. Now, referring to the year 1941, did you have the original return for the partnership for that year? A. Yes, I did.

Q. And what was the return on the partnership, —what was the income of the partnership as shown on this return? A. $20,468.87.

Q. Does that show how that income was distributed? A. Yes, sir.

Q. How was it distributed?

A. 50-50, to A. F. McFee and Dorothy McFee.

Q. And what figure would that make as Mr. McFee's income?

A. It was one-half of that amount.

Q. And did the return show the breakdown?

A. Yes, sir.

(Testimony of H. R. McIntyre.)

Q. You did make notes and you know that it was one-half? A. Yes, sir.

Q. Did you discuss with Mr. McFee the validity of this partnership? A. Yes, sir.

Q. And what did he tell you? [175]

A. We discussed it in a general way and we held that it was a partnership.

Q. What did he tell you regarding the capital contribution of the respective parties?

A. I don't think that we discussed that angle, although the books did show what they did put in.

Q. And was it equally divided between the two parties? A. Yes, sir.

Mr. Patten: You may cross examine the witness.

Cross Examination

Q. (By Mr. Purdy): In all the income tax investigations that you personally made and the examination that you had or conducted with Mr. McFee, or any of his organizations, I will ask you whether Mr. McFee's books and tax returns coincided?

A. Yes, sir.

Q. You have been in the service a long time?

A. Yes, sir.

Q. Is a person required to show anything other than the income for the specific year reported in making out returns, and the expenses for that specific or particular year? A. No, sir.

Q. Then if he had other monies that was not income, it would not show on that return? [176]

A. No, sir, it would not.

Mr. Purdy: That is all.

Mr. Patten: That is all.

HAROLD MASTERSON

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you spell your last name? A. M-a-s-t-e-r-s-o-n.

Q. Where do you live, Mr. Masterson?

A. Wallace, Idaho, 601 Pearl.

Q. And how long have you lived in Wallace?

A. 30 years, approximately, I don't know the exact date.

Q. Do you know the defendant in this proceeding? A. Certainly.

Q. Do you know him very well?

A. Why sure.

Q. Has that acquaintance been casual or intimate? A. Intimate all during that time.

Q. When did you first meet him?

A. In Spokane.

Q. When did you first meet him, what year was that? [177] A. 1929.

Q. Were you closely associated with Mr. McFee at that time? A. No, not at that time.

Q. When did you become closely associated with him? A. When I went to work for him.

Q. When was that? A. In 1929.

Q. What were you doing?

A. I went to work on the machines.

(Testimony of Harold Masterson.)

Q. What kind of machines? A. Slots.

Q. Where? A. All over.

Q. In Spokane? A. Some.

Q. How long were you employed by Mr. McFee at that time? A. Maybe five years.

Q. Was your acquaintanceship interrupted then?

A. Yes, sir.

Q. And when did you next see Mr. McFee.

A. About 1934.

Q. Where was that? A. In Spokane.

Q. How long,—strike that please,—were you living in Spokane then? A. Yes, sir. [178]

Q. Was Mr. McFee living in Spokane then?

A. No, sir.

Q. When did you move to Wallace?

A. In 1934 or 1935, I don't recall the date.

Q. Where did you live in Wallace?

A. I lived at two places.

Q. Where did you first live at Wallace?

A. At the Samuals Hotel.

Q. Was Mr. McFee living there at that time?

A. Yes.

Q. What business was Mr. McFee in at that time? A. The slot machine business.

Q. And were you employed by him then?

A. Part time.

Q. What wages did he pay you?

A. Very little.

Q. Do you recall the exact amount?

A. $12.00.

Q. Was that $12 a week? A. $12 a week.

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(Testimony of Harold Masterson.)

Q. You stated that you lived in two places, where was the next, you mentioned the Samuals Hotel? A. We moved to 303 6th Street.

Q. You say we moved, who do you mean?

A. Mr. McFee and I.

Q. And what is that place? [179]

A. That was his building.

Q. Is that the cinder block building?

A. Of the North Idaho Sales Company.

Q. Why did you move?

A. We thought that the expenses were less—maybe he knew that I could cook.

Q. How much did they charge you for a room at the Samuals Hotel? A. $1.50 a day.

Q. Where did you have your meals?

A. Out until we moved.

Q. After you moved, where did you have your meals? A. I cooked them.

Q. Where did you live with reference to the building—the building you said was Mr. McFee's?

A. In the back room.

Q. How large was this room?

A. It was one room.

Q. Was the stove in that room?

A. Not that room, but in the building.

Q. Did Mr. McFee have other business besides the North Idaho Sales Company? A. Sure.

Q. What other business?

A. We run a bar.

Q. Did he have other employment at that time?

A. At one time he did. [180]

(Testimony of Harold Masterson.)

Q. What was that?

A. At the Green Grocery.

Q. Were you employed at the Green Grocery?

A. No, I don't know how to cut meat.

Q. Did you ever go there? A. Yes.

Q. Why did you go there?

A. To take him down.

Q. What time did you go down there?

A. At 5:30 in the morning.

Q. In the winter or the summer?

A. Partly in the winter and the summer.

Q. You stated that Mr. McFee paid you $12.00 or $12.50 a week, for how long was that your salary?

A. Until the later years. I got more money than that afterward.

Q. Did you always get your salary promptly?

A. Yes, that amount of money I think he could pay $12.00.

Q. When was the salary raised?

A. I would have to look that up.

Q. Was it within a few years?

A. When business picked up, there wasn't very much business at that time and he couldn't pay too much.

Q. Did you ever have to wait for your salary?

A. I don't recall that I had to wait very long.

Q. How were you paid your salary? [181]

A. I might have been paid cash at that time.

Q. Were you later paid by check?

A. Yes sir, always, later.

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(Testimony of Harold Masterson.)

Q. And did you always cash those checks?

A. Not always.

Q. What would happen with the checks?

A. Sometimes I would not cash them.

Q. And why wouldn't you cash them?

A. I knew the money wasn't there.

Q. How did you know it wasn't there?

A. They called me from the bank.

Q. You say that you cooked when you were living at the North Idaho Sales Company building?

A. Yes.

Q. How long did you cook?

A. Well, I cooked there until I moved out.

Q. Did you do the cooking all of the time?

A. No, not all of the time.

Q. Who did the cooking?

A. I got married.

Q. And your wife did the cooking for yourself and Mr. McFee? A. Yes, sir.

Q. How long did you and your wife and Mr. McFee live at the North Idaho Sales Company?

A. Not long after I got married.

Q. In reference to the years 1945 and 1946, what were your [182] duties?

A. Repairing slot machines and collecting.

Q. What territory did you have?

A. Everything we had, all the locations.

Q. Did you cover all of the locations?

A. Yes, sir.

Q. During 1945 and 1946 did you service all of Mr. McFee's machines?

(Testimony of Harold Masterson.)

A. No, not then, we had a bigger spread and we had more men.

Q. How many men did he have then?

A. I cannot recall how many, that of course, depends on what date you ask about.

Q. Generally, during the years 1945 and 1946.

A. We have 3 or 4 in Wallace, 2 or 3 in Coeur d' Alene, 1 at Lewiston and I think that covers it.

Q. And what was that total?

A. Eight men, approximately, sometimes it would be less.

Q. And sometimes more?

A. No, I don't think that we had any more.

Q. What area did you cover during those years?

A. One time I covered Spokane.

Q. In 1945 and 1946, those are the years I am inquiring about now.

A. I was located in Wallace.

Q. You didn't service machines outside of Wallace?

A. I had Shoshone County, that included Avery in Montana. [183]

Q. How many locations did you have to call on?

A. According to the books that I used, I used three or four books at least.

Q. What are those books?

A. They are collection books, 50 pages in each book and I used three or four in one week in making collections.

Q. What information did you put in the book?

A. I collected the money in the slot machines

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(Testimony of Harold Masterson.)

with the operator and they signed the slip and I checked the books in the office.

Q. What was on the slip?

A. It showed every machine that we had.

Q. What would be at the top of the page?

A. The location.

Q. If it were a certain restaurant or tavern?

A. Yes.

Q. And what other information was there?

A. The number of machines, what kind of a machine it was and the total of the take and the split.

Q. Would you indicate whether they were five cent, ten cent or twenty-five cent machines?

A. Yes.

Q. Well, go ahead and describe what else was on the page in the book.

A. The location and the signature.

Q. How many copies would you make of this document? [184] A. Two copies.

Q. What would you do with the first copy?

A. The first copy we kept.

Q. That is the collector? A. Yes.

Q. And the next copy? A. We kept that.

Q. And the third copy?

A. The location gets that.

Q. Would this book show the division of the funds between the location and the North Idaho Sales Company? A. Yes, sir.

Q. From your experience, what generally was the division? A. 50 per cent.

(Testimony of Harold Masterson.)

Q. 50 per cent went to the North Idaho Sales Company? A. Sure.

Q. During the year 1945 and also 1946, did you make such a slip for every location that you visited?

A. I had to.

Q. What did you do with those after you finished with the collection?

A. I checked in the books when the slips and the books were completed.

Q. To whom did you turn those books?

A. To the bookkeeper in the office.

Q. How many locations did you cover in Shoshone County, I think [185] you also said that you went to Montana, how many places did you visit?

A. In 1945 or 1946, in the latter part I would say 150 with phonographs and machines.

Q. 150 locations? A. Yes sir.

Q. What were those?

A. Well, they were taverns and restaurants—we couldn't put them in a home.

Q. How many machines in a location?

A. That would depend on the location.

Q. What was the maximum number in any single location in your area? A. In my area?

Q. Yes, in the area that you served.

A. They might average three.

Q. The maximum number?

A. Some of the locations we may have five machines but not in all of them.

Q. Based on your experience you would say the average is about three?

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(Testimony of Harold Masterson.)

A. I think so, usually two at least and sometimes three besides the phonographs.

Q. How many machines would that be that you serviced?

A. Well that depends on the time that you mean, they kept increasing all of the time. [186]

Q. How many machines, that is, the total, would you have to unlock and get into?

A. It would depend on the day that I collected.

Q. Sometimes you had to go to each machine?

A. Yes, sir.

Q. How many would that be?

A. How many machines?

Q. How many were in your total area?

A. Well sometimes I used four books and that would be close to 200.

The Court: I think we will recess at this time until 2:00 o'clock.

April 25, 1952, 2:00 p.m.

Mr. Patten: That is all I have of this witness, he will be submitted for cross-examination.

Cross-Examination

Q. (By Mr. Purdy): Mr. Masterson handing you Defendant's Exhibit No. 39, I will ask you if you know what that is?

A. That is the collection book that I used to make my collections.

Q. That is the book that you referred to this morning? [187]

(Testimony of Harold Masterson.)

A. That is my collection book, yes sir.

Q. Now, will you describe to the jury when you made those collections what use or purpose that book served?

A. I put down the location—there were carbons and a pencil copy, the carbon tissue and a carbon copy, the carbon copy I could not erase in between any of them, this shows the same copy as the location would get.

Q. Would the location get one copy?

A. Yes, sir.

Q. And what became of the others?

A. I took them.

Q. And they were turned into the office, I think you said? A. Yes, sir.

Mr. Purdy: We will offer that exhibit in evidence.

Mr. Patten: No objection.

The Court: It may be admitted.

Q. Just open that book to the first page—I will ask you if you see a number on the first page?

A. Yes, sir, the number of the page and the number of the book.

Q. That is the number of the book and the page?

A. Yes, sir.

Q. And do you find the same number on the second sheet?

A. There are two numbers here.

Q. I mean on the page, the slip?

A. Yes, the number of the page. [188]

(Testimony of Harold Masterson.)

Q. Now what you find on the next page, that would be the same?

A. There are three pages with the same page number.

Q. Would the same number appear on each of those three pages? A. Yes, sir.

Q. So that they would be identically the same?

A. Yes, sir.

Q. Were you working for the defendant McFee during the period of time in which Shoshone County built the fish hatchery? A. Yes, sir.

Q. Was Mr. McFee operating slot machines at that time? A. Not all of that time.

Q. During the period of time that they were raising money for the fish hatchery?

A. Yes, sir.

Q. And during the time they were raising the money for that hatchery what did you do with the money that you collected?

A. I had a man from the Coeur d' Alene Hardware Company with me and I would take the money from the slot machines and turn it over to the Hardware Company.

Q. And that was for the building of the hatchery? A. Yes, sir.

Q. Nothing was turned to Mr. McFee?

A. He didn't get any in any location.

Q. He never got any of the money?

A. I took it up to the Coeur d' Alene Hardware Company.

Q. What year was that? [189]

(Testimony of Harold Masterson.)

A. I have a record of it.

Q. Could you tell what year that was?

A. I don't recall the exact date, but I still have the record and I could find out.

Q. Mr. Masterson, how long a period did that run?

A. Ran quite a few months—quite a few weeks, I didn't mean months.

Q. For the district in which you were located, did I understand that you did all of the collecting?

A. In that district.

Q. And for each business or the money that you collected you had one of those slips?

A. Yes, sir.

Q. And the location also had a slip?

A. Yes, sir.

Q. Who deposited the money in the bank?

A. I did.

Q. Now, was there any method that you had to check the bank deposits with the slips?

A. Yes, sir.

Q. How would you do that?

A. I would put the number on the top of the bank slip that I was banking, the number of the book.

Q. And the bank balance, or slip, and the book would balance?

A. The deposit slip would balance with the book, I don't know about the bank balance. [190]

Q. But your book and the bank deposit would balance? A. They had to.

(Testimony of Harold Masterson.)

Q. Did you know Perry Magee?

A. Yes, sir.

Q. Was he employed by Mr. McFee?

A. Part time.

Q. Did you have trouble with him?

A. Yes, sir.

Q. What was that trouble?

A. I wouldn't turn the collections to him.

Q. He wanted you to turn the collections to him and him deposit them? A. Yes, sir.

Q. And you refused to do that?

A. Yes, sir.

Q. Mr. Masterson, did Mr. McFee travel quite extensively? A. At times.

Q. And would he be gone for a considerable period of time? A. Sometimes he would.

Q. Do you know of your own knowledge what he might have been doing during those times?

A. He didn't tell me.

Q. Do you have any idea what the fish hatchery cost?

A. I don't know; I know that it cost a lot of money but I didn't see the figure.

Q. Mr. Masterson, to your best recollection what were some of [191] the best years that you had in your collections?

A. Well, that depends on where I was collecting.

Q. Taking it as a whole, as to the year 1942, 1943, 1936 and 1937 and so on?

A. Well I collected a lot of years and I cannot recall which was the best, it didn't make much dif-

(Testimony of Harold Masterson.)

ference in one place, where I would collect at one place it didn't go up and down too much.

Mr. Purdy: That is all, thank you.

Mr. Patten: That is all.

DAN HANNAH

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Mr. Hannah, will you tell the jury where you live?

A. Wallace, Idaho.

Q. What do you do in Wallace?

A. Work in the bank.

Q. What bank?

A. The Idaho First National.

Q. Is that the bank O. L. Jones is connected with? A. He is the manager. [192]

Q. What is your position?

A. Assistant manager.

Q. We asked for certain records of the bank, do you have them with you? A. I do.

Q. Can you identify Plaintiff's Exhibit Number 40? A. Yes, sir, I can.

Q. Is it an official record of the bank?

A. Yes, sir.

Q. And that is a correct copy of the original which you have now? A. Yes, sir.

Q. Will you identify it more fully?

(Testimony of Dan Hannah.)

A. $5,000.00 in currency is the total amount of the deposit.

Q. Is that a deposit slip? A. Yes, sir.

Q. And what is the date of the deposit?

A. February 20, 1946.

Q. To whom?

Mr. Purdy: I would suggest that it be put in evidence before it is read.

Mr. Patten: I offer this in evidence.

Mr. Purdy: We have no objections.

The Court: It may be admitted and a copy will be introduced and the original returned to the witness.

Q. Whose account is that? [193]

A. A. F. McFee.

Q. And will you give the date?

A. February 20, 1946.

Q. What does the deposit slip show?

A. $5,000.00 cash,—currency, deposited to his account.

Q. You have been handed Plaintiff's Exhibit No. 41, can you identify that?

A. This is a card, a ledger card, loose-leaf ledger card that we use in connection with loans; it shows the debits, the credits and the balance carried forward.

Q. That is an official record of the bank?

A. This is the original record and only copy.

Mr. Patten: I would like to introduce Exhibit No. 41 in evidence.

(Testimony of Dan Hannah.)

Mr. Purdy: No objections.

The Court: It may be admitted.

Q. By examining that card can you tell us whether or not the loans,—tell us first whose ledger card that is? A. Roger W. Greenough.

Q. Does that reflect the loans to Mr. Greenough during 1946?

A. I don't see that date here. Oh, yes, here it is; some of the later ones that had the date in one spot but here it is (indicating).

Q. What was the date of that loan?

A. It was dated,—the note was dated November 2, 1946. And put through our books November 4, 1946. [194]

Q. What is the amount of that loan?

A. $5,000.00.

Q. Now, you have been handed Plaintiff's Exhibit No. 42, will you please identify that?

A. That is the collateral record.

Q. It is an official record of the bank?

A. Yes, original, duplicate and triplicate.

Mr. Patten: I would like to offer Exhibit No. 42 in evidence.

Mr. Purdy: We have no objections.

The Court: It may be admitted.

Q. Mr. Hannah, will you tell the jury from this record what collateral was used to secure the loan to Mr. Greenough?

A. A $5,000.00 cashier's check drawn in favor of A. F. McFee on the Idaho First National Bank.

Q. You have been handed Plaintiff's Exhibit

(Testimony of Dan Hannah.)

No. 19, can you tell whether that is the cashier's check used as collateral for the loan to Mr. Greenough? A. It was.

Mr. Patten: I offer Exhibit No. 19 in evidence at this time.

Mr. Purdy: No objections.

The Court: It may be admitted.

Q. Mr. Hannah, you have been handed Plaintiff's Exhibit No. 43, would you identify that please?

A. That is an order for United States Securities, a duplicate [195] of the order.

Q. Is that an official record of the bank?

A. Yes, sir.

Mr. Patten: I would like to offer Exhibit No. 43 in evidence.

Mr. Purdy: No objections.

The Court: It may be admitted.

Q. Would you identify that document?

A. This is for the purchase of $10,000.00 par value two and one-half per cent Treasury Bonds due in 1972, optional payment in 1967, the purchaser was A. F. McFee.

Q. And the date? A. June 18, 1945.

Q. Mr. Hannah, you have been handed Plaintiff's Exhibit No. 44 for identification, will you please identify that document for us.

A. That is our bank's collateral record.

Mr. Patten: I would like to offer Exhibit No. 44 in evidence.

Mr. Purdy: No objections.

The Court: It may be admitted.

(Testimony of Dan Hannah.)

Q. Now Mr. Hannah, would you look at Exhibit No. 44 and identify that more fully?

A. Well, there was a loan made in the bank,—this $10,000.00 of treasury two and one-half per cent bonds due 1972 the numbers being on this collateral record was put up as [196] to the loan.

Q. How much was the loan?

A. Presumably $10,000.00; we make loans on face value but I have nothing to show right here, this is only the collateral record.

Q. You have been handed Plaintiff's Exhibit No. 19,—I beg your pardon, I mean No. 16, can you look on Exhibit No. 16 and see if you recognize the loan to which the collateral record you just had relates?

A. Going by the date only I think it is loan No. 59.

Q. What was the date of that loan?

A. June 18, 1945.

Q. It is credited on June 18, 1945, as a bank loan of $10,000.00 to Mr. McFee.

A. Yes, sir.

Q. What was the date the government bond was purchased? A. June 18, 1945.

Q. From your experience tell us, are these transactions related?

A. I would say so due to the numbers I see on them.

Mr. Patten: You may cross examine the witness.

Cross Examination

Q. (By Mr. Purdy): Is there anything on the

(Testimony of Dan Hannah.)

deposit slip, Exhibit No. 40, that would identify the person who made the deposit? [197]

A. No, sir.

Mr. Purdy: That is all.

Redirect Examination

Q. (By Mr. Patten): That shows to whose account it was deposited? A. Yes, sir.

Q. And who is that person?

A. A. F. McFee.

Mr. Patten: That is all.

Mr. Purdy: That is all.

H. R. McINTYRE

Being recalled as a witness by the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): When you testified this morning you told us that you audited Mr. McFee's return for the year 1943 and the partnership returns for the North Idaho Sales Company for the years,—was that 1941 or 1937? A. Both.

Q. With respect to one of these years you stated that you did not have the original return of Mr. McFee as an individual, [198] which year was that?

A. 1941.

Q. Have you stated that you had audited the return of Mr. McFee for 1941?

A. We used as a basis the taxpayers return.

Q. Who furnished that?

A. It was in the taxpayer's file at the time we examined it.

(Testimony of H. R. McIntyre.)

Q. As a result of the use of that duplicate, that the taxpayer furnished you would you tell us what the income was on that return?

A. $9,587.00.

Q. For what year? A. 1941.

Q. That is the individual return of A. F. McFee?

A. Yes, sir.

Mr. Patten: You may examine.

Mr. Purdy: No questions.

RAY F. OLSEN

Recalled as a witness by the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Mr. Olsen you have been previously sworn, you have given [199] your name, and address and qualification? A. Yes, sir.

Q. Have you examined the capital account of the North Idaho Sales Company? A. Yes, sir.

Q. For the years 1945 and 1946?

A. Yes, sir.

Q. Where were those books located?

A. In the office of the North Idaho Sales Company.

Q. Who furnished you those books?

A. Bill Emasio.

Q. Referring specifically to year 1945, would you tell the jury what was the capital in Mr. McFee's drawing account at the beginning of that year as shown from the books which you examined?

(Testimony of Ray F. Olsen.)

A. The capital account?

Q. The investment and capital, you have also examined the capital account? A. Yes, sir.

Q. Referring to the capital account, what was the balance at the beginning of the year 1945, January 1, 1945 of Mr. A. F. McFee?

A. $59,693.77.

Q. And what was the balance at the end of that year? A. $62,661.03.

Q. Would you explain to the jury the difference between those [200] two figures?

A. There was an increase in the capital account due to the profit to $66,947.03; the account was reduced by withdrawals of $63,979.77.

Q. Have you also examined the drawing account of A. F. McFee for the year 1945? A. Yes, sir.

Q. Will you explain to the jury the various items withdrawn out of that account?

A. This is 1945?

Q. Yes.

A. $25,511.00 withdrawn and deposited to the Murphy Lease.

Q. That is the Murphy Lease?

A. The Murphy Lease and then an item of $600.00 to Myron Anderson for a lot; $1,000.00 to the White Delf Mining Company stock, that was for mining company stock and Alice Geothe was paid $225.00 for 50 shares of Polaris Mining stock; Pennaluna Company was paid $4,375.00 for 10,000 shares ofPolaris stock; F. C. Keane, $1,000 for Lucky Friday Extension stock; Henry L Day for mining

(Testimony of Ray F. Olsen.)

claims $10,000; $8,500.00 paid the Rice Building; Idaho First National Bank was paid on January 2 $100.00 on note, February 1 $500.00 on note, February 5, $100.00 on note, February 28, $100.00 on note; March 21, $500.00 on note, May 24, $1,000.00; on December 27 Ruth Poska was given $5,000.00; the next is miscellaneous travel checks $2,400.00; [201] payment on insurance premiums $1,359.55; J. A. Peterson $872.52; Expenses of operating Arnet Building $872.52; real-estate taxes $846.65; miscellaneous charges $453.55 making a total of $64,943.27. Against that there was a credit of $963.50 or a total withdrawn of $63,979.77.

Q. Have you examined Mr. McFee's drawing account on the books of the Foresters Club at Lewiston? A. Yes, sir.

Q. How much was drawn out of that account during 1945?

A. Near the end of December $15,000.00.

Q. Do you know what those funds were used for?

A. Yes, that is I know those were in a check held at the end of the year.

Q. Have you examined Mr. McFee's drawing account from the Foresters Club at Coeur d 'Alene?

A. Yes, sir.

Q. For the same year? A. Yes, sir.

Q. What drawing did he make out of that club account during 1945? A. None.

Q. Have you examined Mr. McFee's drawing

(Testimony of Ray F. Olsen.)

account from the Gem and the Big Barn Club—is that one or two clubs?

A. One club I understand.

Q. Have you examined his drawings out of that club? A. Yes, sir. [202]

Q. What were those drawings, if any and my question goes to the year 1945? A. None.

Q. Did you examine Mr. McFee's drawing account of the Murphy Lease? A. Yes, sir.

Q. What drawings did he make, if any, out of that account during 1945?

A. The only withdrawal was the right-off of the account $10.00.

Q. Did you examine the drawing account of Mr. McFee in the Dan Mac Lease? A. Yes, sir.

Q. What if anything did he draw out of this account in 1945? A. None.

Q. Could you quickly total Mr. McFee's withdrawals during the year 1945 from all of the books of his operations?

A. $63,979.77, from the North Idaho Sales Company and $15,000.00 from the Foresters Club at Lewiston.

Q. And $10.00 from the Murphy Lease?

A. That was a $10.00 adjustment.

Q. Was that just an adjustment on the books?

A. It says, right-off, accounts receivable.

Q. Do the drawing accounts that you examined cover all of the business of Mr. McFee shown on his returns with the exception of rents and interest? A. Yes, sir. [203]

(Testimony of Ray F. Olsen.)

Q. Now, referring to the year 1946, what was Mr. McFee's capital account on the books of the North Idaho Sales Company on January 1, 1946?

A. $62,661.03.

Q. And what was the capital account on December 31, 1946? A. $106,541.74.

Q. Will you explain the adjustments which brought about this change?

A. There was a profit for the year 1946 of $84,461.42; an additional investment of $5,000.00 in February 1946; an additional investment of $1,200.00 in April 1946; an additional investment of $5,000.00 in June 1946, this $5,000.00 was withdrawn from A. F. McFee special account with the First National Bank of Wallace. An additional investment of $5,000.00 in July 1946 this was withdrawn from the A. F. McFee special account with the First National Bank of Wallace and there was withdrawn $56,830.71.

Q. Have you examined the drawing account on the books of the North Idaho Sales Company for the year 1946? A. Yes, sir.

Q. Will you tell the jury what you found on that date and tell them the nature of those drawings.

A. September 1946, $25,000.00 paid to William Stansfield for the Samuals Hotel contract and on the same date there was $5,500.00 paid to William Stansfield, there was invested in the Murphy Lease $21,900.00; $2,400.00 in personal items; [204] a total payment for insurance $1,328.60; state income tax

(Testimony of Ray F. Olsen.)

$1,472.75; an additional payment on the Samuals Hotel $630.15; $150.00 to the Golden Eagle Mining Company for stock; the next item was $1,580.48, miscellaneous expenditures. There were credits of $90.00 a refund at Athol and a refund by William Stansfield of $2,741.27 and miscellaneous credit of $300.00 leaving a total withdrawal of $56,830.71.

Q. Have you examined the books of the Foresters Club for Mr. McFee's withdrawals?

A. Yes, sir.

Q. And what amounts were withdawn through that account?

A. In July of 1946 $5,000.00 was withdrawn.

Q. Do you know the purpose of that?

A. That was invested in the North Idaho Sales Company.

Q. Was the Foresters Club at Coeur d' Alene in operation during 1946? A. No, sir.

Q. Was the Gem Club and the Big Barn in operation? A. Yes, sir.

Q. In 1946? A. Yes, sir.

Q. Did you examine the McFee drawing account for the Murphy Lease? A. Yes, sir.

Q. What was withdrawn through that account?

A. None.

Q. Did you examine the McFee drawing account on the books of the Dan Mac Lease?

A. Yes, sir.

Q. Will you tell the jury what funds were withdrawn if any from that account? A. None.

Q. In addition to examining the books of Mr.

(Testimony of Ray F. Olsen.)

McFee's enterprises have you examined his bank account? A. Yes, sir.

Q. Would you name those accounts which you examined and did your examination cover the years 1945 and 1946?

A. The bank account of the North Idaho Sales Company.

Q. And give us the names of those banks.

A. In the Idaho First National Bank of Wallace, the Idaho First National Bank of Coeur d' Alene, the Dan Mac Lease bank account in the Idaho First National Bank of Wallace, the Murphy Lease in the Idaho First National Bank of Wallace, and the Foresters Club bank account in the Idaho First National Bank in Coeur d' Alene.

Q. How about the Foresters Club in Lewiston?

A. No, sir.

Q. You have examined the drawing—may I withdraw that—you have Exhibits 27 and 28, what are those?

A. Exhibit Number 27 is the account of the North Idaho Sales Company in the Lewiston Branch of the First Security Bank [206] of Idaho.

Q. And what is Exhibit Number 28?

A. Exhibit Number 28 is the bank account of the Foresters Club care of the North Idaho Sales Company Desert Hotel Building, Coeur d' Alene, Idaho, A. F. McFee by M. Lucille Dolan.

Q. Have you an account of the Big Barn and Gem Club? A. No, sir.

(Testimony of Ray F. Olsen.)

Q. You have been handed Exhibit Number 25, will you tell us what that is?

A. Exhibit Number 25 is a transcript of the account of the Big Barn and Gem Club from January 1, 1945 to December 31, 1945 inclusive.

Q. You have been handed Exhibit Number 17. Will you tell the jury if the purchase of those checks have been charged to any of Mr. McFee's drawing accounts which you have examined?

A. No, sir, neither one of them.

Q Could you find corresponding withdrawals in any of the bank accounts that you examined?

A. No, sir.

Q. Will you examine the remaining bank accounts and see if you can find any corresponding withdrawals withdrawn from those accounts?

A. None on those dates.

Q. You are a certified public accountant? [207]

A. Yes, sir.

Q. Could an item such as that be withdrawn if the books of the business balanced, could the funds be withdrawn for the personal use of the proprietor from the bank accounts and not charged to his drawing account?

A. Withdrawn for personal use but not business purposes, no, his books would not balance.

Q. Then it is not really necessary to examine those accounts in detail?

A. Well, if the books—if you withdraw something from the bank account your books will be out of balance unless it is charged to some draw-

(Testimony of Ray F. Olsen.)

ing account or to business expense.

Q. And if it is personal expenses where would it be charged? A. In the drawing account.

Q. There is no corresponding withdrawals for the purchase of those checks?

A. No, there isn't.

Q. You are being handed Exhibit Number 18.

A. This is Number 19.

Q. Number 19, will you state whether or not the purchase of this cashier's chesk has been charged to any of Mr. McFee's drawing accounts?

A. No, sir.

Q. Was the purchase of Exhibit Number 19 made through any of the bank accounts that you examined? A. No, sir. [208]

Q. Would you examine the remaining bank accounts and tell us whether they have been charged to those accounts?

A. On November 6, 1946 there is a $5,000.00 check out of the Coeur d' Alene branch of the Idaho First National Bank charged to the Foresters Club but that was charged four days after this check was written so it is not probable that this was written out of this account.

Q. Was this drawn for this purpose on Mr. McFee's account or on the Foresters Club?

A. No, it was not.

Q. Handing you Exhibit Number 18, will you state whether or not the purchase of either of those checks was charged to Mr. McFee on either of the drawing accounts of his business? A. No, sir.

(Testimony of Ray F. Olsen.)

Q. Can you state whether the purchase of these checks, whether these checks were purchased from any funds coming from any of the bank accounts that referred to? A. They did not.

Q. Will you examine the remaining bank accounts and state if they were charged to those accounts? A. No, sir, they were not.

Q. Mr. Olsen, with respect to the year 1945 I believe that you stated you have examined the investment account in the Dan Mac Lease.

A. Yes, sir. [209]

Q. Will you tell the jury the amount of that investment, the amount Mr. McFee invested in the Dan Mac Lease in 1945? A. $30,300.00.

Q. Will you tell the jury what portion of this investment was made with funds out of drawing accounts?

A. One check deposited on February 1, 1945 for $1,000.00; a second check on February 23, for $500.00.

Q. What drawing accounts were those checks charged to?

A. The North Idaho Sales Company.

Q. Did you examine all of Mr. McFee's drawing accounts to see whether or not this capital investment could have come from other drawing accounts? A. I did.

Q. Did any of them come from other drawing accounts? A. No, sir.

Q. With reference to 1946 will you tell the jury the total amount Mr. McFee invested in the Dan Mac Lease?

(Testimony of Ray F. Olsen.)

A. $21,250.00.

Q. Did any of those funds come out of McFee's drawing accounts? A. No, sir.

Q. By referring to those bank accounts can you determine if any of those funds came out of the bank accounts?

A. They could not have come out of those bank accounts unless they were charged to something else, or as something else other than drawings. [210]

Q. What would have been the effect upon the reported income if they had been charged to something else other than drawings?

Mr. Emigh: We object to that as calling for a conclusion of the witness, let him state the facts.

The Court: He is here as an expert, he may answer.

A. It would have understated his income.

Q. Did Mr. McFee have a loan account on any of those businesses covered by these bank accounts that you hold in your hand?

A. What type of loan account do you mean?

Q. Did he have one?

A. You mean did he borrow money from the bank?

Q. Any money in the nature of loans would be in the nature of a drawing account.

A. Well, it would be possible due to organization——

Q. ——Mr. Olsen, do you know whether he had such an account with the Foresters Club here or at Lewiston?

(Testimony of Ray F. Olsen.)

A. The books indicate that there was a $10,000.00 note payable to the Foresters Club at Coeur d' Alene, that is shown on the books of the North Idaho Sales Company.

Q. That is the only loan?

A. That is the only loan.

Q. Can you explain that loan any further, what year is that?

A. It is shown on the liabilities as of December 1943 so it was sometime before that.

Q. And that is the only loan account? [211]

A. Yes, sir.

Q. Connected with the Foresters Club?

A. There are some little account receivables interchangeable but that is the only loan.

Q. You were—will you explain how that transfer deposit was handled on the books of the Foresters Club?

A. This item of $3,000.00 was an additional capital credit to the investment account of the Foresters Club at Lewiston.

Q. Was that addition of Mr. McFee's investment in the Foresters Club in Lewiston accounted for by the capital accounts in some other of his businesses?

A. The records that I have indicate that it did not, it was not accounted for.

Q. Are there any drawings on the McFee drawing account that could account for the deposit of the $2,500.00 in the Dakota National Bank of Fargo on January 26, 1946?

(Testimony of Ray F. Olsen.)

A. You say any withdrawals?

Q. Yes, that could account for the deposit of this amount in currency in the Dakota National Bank at Fargo on January 26, 1946?

A. I did not find such an item.

The Court: I think we will recess at this time until 10:00 on Monday morning April 28, and I will ask you ladies and gentlemen of the jury to meet me here at that time.

April 28, 1952, 10:00 o'clock a.m. [212]

Q. Mr. Olsen, shortly before we adjourned you told the jury that $5,000.00 was withdrawn from McFee's account at the Foresters Club Lewiston, Idaho in July of 1946 and that those funds were transferred to the North Idaho Sales Company?

A. Yes, I want to correct this, those were funds to J. A. Allen which cleared the bank in November 1946 and was used for the payment of some stock and did not get to the North Idaho Sales Company.

Q. When was this charged to the Foresters Club? A. November 1946.

Q. From your examination of Mr. McFee's drawing accounts in his various ventures have you prepared a schedule showing a summary of his drawings? A. Yes, sir.

Mr. Patten: I would like to have these marked as Exhibits 45 and 46 and I would like to offer them in evidence at this time.

Mr. Purdy: We have no objections.

(Testimony of Ray F. Olsen.)

The Court: They may be admitted, both of the exhibits.

Q. Mr. Olsen, I notice from the exhibits that during December 1945 Mr. McFee withdrw $15,000.00 from the Foresters Club at Lewiston—that was during 1945 according to this exhibit, now, from an examination of the record, that is his record, what was the disposition of those drawings?

A. The check was cancelled, cleared at the First National at Wallace and the funds were taken in cash and not redeposited in his own business ventures.

Q. When was this check cashed?

A. Right near the end of 1945, I don't remember the exact date but it was the last of 1945 or early in 1946.

Q. Could Mr. McFee had used this $15,000.00 for any of the otherwise unexplained expenditures during 1945? A. He could have.

Mr. Emigh: We object to that as a conclusion of the witness and ask that it be stricken.

The Court: He may answer where he obtained the figures from the books that he examined.

Q. Mr. Olsen you have been handed Exhibit Number 19?

A. That is a cashier's check number 125406 drawn on the Idaho First National Bank of Wallace, Idaho payable to A. F. McFee or ourselves, collateral receipt 120484 in the amount of $5,000.00.

Q. Is the purchase of this check charged to any of McFee's drawings or bank accounts?

(Testimony of Ray F. Olsen.)

A. No.

Q. Can you identify Exhibit Number 22 which has been handed to you?

A. A deposit slip, deposited with the Idaho First National Bank of Wallace and credited to J. A. Allen December 31, 1946, currency $10,000.00, check $10,000.00 a total of [214] $20,000.00.

Q. Will you tell the jury whether the payments of $10,000.00 is shown by McFee on any bank account? A. It is not.

Q. On Exhibit Number 33, can you identify that?

A. That is a record of the savings department Dakota National Bank, savings deposit of E. M. Stern number 3674, Fargo, North Dakota January 26, 1946 deposited currency $2,800.00 and $18.95 silver, a total of $2,818.95.

Q. Will you tell the jury if the deposit of $2,500.00 to the Stern account on this date can be explained by withdrawals by McFee or through any bank account?

Mr. Emigh: We object to that as calling for a conclusion of the witness and it evades the province of the jury.

The Court: How can it evade the province of this jury, I don't understand that, he may answer.

A. It was not a withdrawal from any of McFee's known businesses.

Q. Or bank accounts?

A. No, nor any bank accounts.

(Testimony of Ray F. Olsen.)

Q. Are any funds shown on McFee's books as going to Stern about this date?

A. One check drawn in February 1946 for $2,-170.00 which was charged to the purchasing account as liquor for the Foresters Club and that was charged to the purchase of liquor and couldn't have been this item because this is something else, purchase of liquor. [215]

Q. Tell the jury if the expenditure of $9,000.00 about March 21, 1946 by McFee in North Dakota can be accounted for by any withdrawals from McFee's accounts or any of his bank accounts?

A. It cannot.

Q. Will you identify Exhibit Number 37?

A. Yes.

Q. That was handed to you by the Bailiff?

A. It is a ledger account of J. L. Sonduck of Dickinson, North Dakota showing amounts of money loaned to Mr. Sonduck, according to this sheet it shows receivable, showing debits and balance.

Q. Did you see this record when you examined Mr. McFee's books? A. I did not.

Q. Have you ever seen the original of this record? A. No, sir.

Q. Can the loans on that record be accounted for by withdrawls from any of McFee's accounts, drawing accounts or bank accounts?

A. No, they cannot.

Q. You are handed Exhibit Number 38, can you tell the jury whether or not this shows any additional loans to Mr. Sonduck or to Sonduck and

(Testimony of Ray F. Olsen.)

Schwenk Lumber Company during 1946?

A. It shows loans or a loan and according to this sheet—— [216]

Q. ——Can those be accounted for by any withdrawals from Mr. McFee's drawing or bank accounts? A. It cannot.

Q. You are handed Exhibit Number 40, can you identify that?

A. It is a deposit slip with the Wallace Branch of the Idaho First National Bank for the credit of A. F. McFee, dated Wallace, Idaho February 20, 1946, currency $5,000.00, total of the deposit, $5,000.00.

Q. How was that transaction handled on the books of A. F. McFee?

A. It was credited to the investment account of the proprietor account of the North Idaho Sales Company.

Q. On the same date? A. February 1946.

Q. Will you tell the jury whether or not the additional investment in the North Idaho Sales Company can be accounted for by withdrawals though drawing accounts or bank accounts of A. F. McFee or any of his other businesses?

A. It cannot.

Mr. Emigh: We wish to enter an objection that it is calling for a conclusion of the witness and evading the province of the jury as the available funds from other sources than the books that he examined are not known to him and the statement that this investment cannot come from other funds

(Testimony of Ray F. Olsen.)

is rather speculative and evading the province of the jury and it is not limited to the confines [217] of the books that he is purported to have examined.

The Court: The objection is overruled; the witness is here as an expert, the witness examined the records, he is here as an investigator and an accountant, there is no other way the jury can get this information except from a witness as Mr. Olsen, the answer may stand.

Q. Will you tell the jury whether or not the drawing accounts of Mr. McFee or his various businesses or bank accounts—withdraw that please—will you tell the jury whether or not the drawing accounts with Mr. McFee and the various businesses or bank accounts show a loan to M. R. Arnold for $5,000.00 during 1945? A. They do not.

Q. Do the various bank accounts or drawing accounts of Mr. McFee in his various ventures or businesses show a loan of $4,000.00 to Mr. Arnold during 1946? A. They do not.

Q. You are handed Exhibit Number 16, will you identify that please?

A. It is a liability record of A. F. McFee showing loans, the dates the loans are made, date the loan was paid, collateral and endorsement, the date of payment, the maturity of the note, the rate of interest, the debits amount, the credit amount and the balance, it represents the loans—the loan account of the bank.

Q. Will you tell the jury how much Mr. McFee

(Testimony of Ray F. Olsen.)

borrowed from the [218] Idaho First National Bank during 1945? A. $37,500.00.

Q. From your examination of his records will you tell the jury what disposition was made of those borrowed funds?

A. $10,000.00, I believe that was in June was used to buy Government Bonds for $10,000.00 and the proceeds from the $27,500.00 shows as deposited in the books of the North Idaho Sales Company.

Q. Will you tell the jury according to the records how much Mr. McFee borrowed from the Idaho First National Bank of Wallace during the year of 1946? A. $20,000.00.

Q. From your examination of Mr. McFee's records will you tell the jury what disposition was made of those funds?

A. They went to the North Idaho Sales Company.

Q. Now, from your examination of this ledger will you tell the jury how much Mr. McFee repaid to the Idaho First National Bank in Wallace during 1945? A. Do you want the items separate?

Q. Just give the total items, just the total repayments. A. $13,589.13.

Q. Would you tell the jury which of those payments were accounted for by withdrawals from Mr. McFee's books or his bank accounts?

A. $5,800.00 were accounted for.

Q. Will you tell the jury what portion of those repayments [219] cannot be accounted for by withdrawals from the books and the bank accounts?

(Testimony of Ray F. Olsen.)

A. $7,789.13.

Q. Will you tell the jury from the examination of this ledger what repayments was made on these loans in 1946? A. $5,637.68.

Q. Were these payments accounted for by withdrawals from Mr. McFee's drawing accounts or bank accounts? A. No, sir.

Q. When did you first meet Mr. McFee?

A. I believe it was in May or early June 1947.

Q. Why did you meet him at that time?

A. To arrange to examine his income tax returns for 1942, 1943, 1944, 1945 and 1946.

Q. After the investigation had progressed awhile did you have a conversation with Mr. McFee?

A. I talked with Mr. McFee and Mr. Emasio in McFee's office along with Mr. Rice.

Q. What was the date of that conversation?

A. It was in the early part of 1948.

Q. Who is Mr. Rice?

A. He is a special agent for the Intelligence Unit.

Q. Is Mr. Emasio the gentleman who previously testified here in this case? A. Yes, sir.

Q. And did you place the date of that conversation? [220] A. It was early in 1948.

Q. What if anything did you say to Mr. McFee and what, if anything, did he say to you?

Mr. Emigh: We object to that for the reason that the date of the alleged conversation is not sufficiently identified and the further reason that any statement would be in the nature of an extra-ju-

(Testimony of Ray F. Olsen.)

dicial admission and not admissable at this time because the corpus delicti is not established.

The Court: He may answer.

A. We told him during the course of the examination that there were large expenditures and we could not determine their source and we wondered if he could explain where they came from.

Q. What did he say?

A. He thought part could have come from funds he had at the close of 1941.

Q. Did he mention the amount of funds that he estimated that he had on hand at that time?

A. He estimated that he had on hand at that time about $50,000.00 in cash.

Q. Did you discuss this matter with Mr. McFee at a later date? A. Yes, sir.

Q. When and where did this conversation take place?

A. In May or June in 1948, we went to his apartment in the Samuals Hotel to see if we couldn't account for some of [221] these large expenditures and went over all of the assets that we had or knew about that he had on hand showing what he owned; to see if we couldn't account for the large expenditures that we had not been able to account for.

Q. And what did you ask Mr. McFee.

Mr. Emigh: We will ask that the same obption be shown on the record, that this is in nature of an extra-judicial admission, it is incompetent on the ground

(Testimony of Ray F. Olsen.)

that the corpus delicti has not been shown.

The Court: And the record may show the same ruling.

Mr. Emigh: I wonder if the record may show that we have the same objections to this entire line of questions.

The Court: No, I don't believe that we should do that, you may make your objection. You may answer, Mr. Witness.

A. At this time Mr. McFee stated that he would try to produce some record and that he would prove what he had on hand at the end of 1941, he thought that he could produce the record to prove that he had on hand at that time $50,000.00 in cash.

Q. Did you discuss with Mr. McFee any other source from which this could have come?

A. We asked if he had any other source.

Q. And what did he say?

Mr. Emigh: We make the same objection.

The Court: The same ruling.

A. He said that he didn't. [222]

Q. And what steps did you take to determine any possible source of those funds?

A. We examined his books and records and also the Court records and the County records in Wallace, in Shoshone and also in Kootenai County and up at Sandpoint, in that County, we examined those records and also in Lewiston and in Moscow for any evidence of sales or any transactions which might have taken place which he might have forgotten about that could increase or account for some of

(Testimony of Ray F. Olsen.)

the expenditures that we were not able to account for, that would increase the income.

Q. And what would have been the effect if you had found that Mr. McFee had sold some property?

Mr. Emigh: We object to that as being entirely speculative.

A. Well if we could have found where he had sold some property that could have accounted for some of the funds that he had expended that we could not account for at that time.

Q. Did Mr. McFee ever furnish you any records with respect to this $50,000.00 that he told you that he had? A. No.

Q. Did you subsequently discuss that matter with McFee?

A. We talked with him after the conversation with him at the hotel and he said that he was going to Seattle.

Q. Where was that? A. That was in Wallace.

Q. Where in Wallace?

A. It was in front of the Idaho First National Bank.

Q. Was that the same day? A. Yes.

Q. What did he say?

Mr. Emigh: We object to that if it is for the purpose of introducing an admission by the defendant, it would be an extra-judicial or admission —the corpus delicti is not established and therefore any such statement as called for would be extra-judicial in character.

The Court: He may answer.

(Testimony of Ray F. Olsen.)

A. He was going to Seattle at that time and that he would get the records showing that he had this money on hand at the close of 1941.

Q. From your examination of Mr. McFee's returns and records and the exhibits introduced in this trial have you computed Mr. McFee's net income for 1945 and 1946? A. Yes, sir.

Q. How did you compute that?

A. First through unaccountable expenditures.

Q. Do you have that exhibit with you?

A. Yes, sir.

Mr. Patten: I will have this marked as Plaintiff's Exhibit Number 47 for identification and I will offer it in evidence at this time. [224]

Mr. Purdy: We have no objection.

The Court: It may be admitted.

Mr. Patten: Your Honor, we have that exhibit copied on a blackboard and we request permission to bring it into the Courtroom so that it may be shown to the jury at this time.

Q. Have you computed Mr. McFee's income for the calendar year of 1946? A. Yes, sir.

Q. Do you have the computation with you?

A. Yes, sir.

Q. Will you hand it to the Bailiff so that it may be marked? A. Yes, sir.

Mr. Patten: I offer in evidence at this time, if the Court please, Exhibit Number 48.

Mr. Purdy: No objection.

The Court: It may be admitted.

Mr. Emigh: We think that it is irregular to have

(Testimony of Ray F. Olsen.)

this on the blackboard in front of the jury, we object to the proceedings; the exhibit is in evidence and may be examined by the jury if they desire; this is an attempt to substitute the exhibit on the blackboard for the one offered in evidence and to keep it before the jury.

The Court: I will permit the use of the blackboard for illustrative purposes and then it will be removed. Do you wish that the exhibit be handed to the jury? [225]

Mr. Patten: Yes, I would like that handed to the jury.

The Court: You may have that done.

Q. Can you tell the jury the source of the first figure on that exhibit?

A. That is net income shown on the income tax return, $25,166.67. That is the net income shown on the return.

Q. What is the next item?

A. This is a loan to Mr. Sonduck, or a number of loans, the figure is $39,613.06 which we could not determine the source that is we couldn't determine the source of the income from which those were paid or made.

Q. And the next item will you identify that or tell us what it is?

A. That is a $5,000.00 loan to M. R. Arnold which we couldn't determine.

Q. And the next, Mr. Olsen, what is that?

A. $28,800.00 investment in the Dan Mac Lease which we could not determine the source of.

(Testimony of Ray F. Olsen.)

Q. And the next item on the exhibit?

A. A payment of $7,789.13 which we couldn't determine the source of.

Q. And the next is the aggregate total?

A. Yes, sir, $81,202.19.

Q. You have subtracted certain items, what is the first?

A. $123.76 dividends which were not deposited in the bank and [226] could have been used to pay those items.

Q. Was that dividend reported on Mr. McFee's return? A. Yes, sir.

Q. And this last item that you subtracted?

A. Well that is an aggregate amount allowed of $1,167.20 for machines lost.

Q. Did Mr. McFee claim that on his return for the year?

A. There was some question about this and we allowed it.

Q. What was Mr. McFee's net income for the year 1945 according to your investigation which was taxable? A. $105,077.90.

Q. What income did he report?

A. $25,166.67.

Q. Now, will you turn to Exhibit Number 48, where did you obtain the first figure on that exhibit?

A. The amount shown on the income tax return, $39,769.01.

Q. And the next item?

(Testimony of Ray F. Olsen.)

A. That was a payment to E. M. Stern, $12,500.00.

Q. That was for the year 1946?

A. Yes, for the year 1946.

Q. And that is from undetermined sources?

A. Yes.

Q. And the next item?

A. That is $3,000.00, a cashier's check to W. F. Murphy.

Q. Will you go ahead with the items shown?

A. The next is a check deposited with E. M. Stern $2,500.00. [227] The next is a payment to the United States Court, Bismarck, North Dakota, of $7,500.00; the next is a payment to Mr. Stern for Francis Murphy, $1,500.00; the next item is a payment to J. A. Allen of $10,000.00; the next item is an investment in the Dan Mac Lease $21,250.00; the next item is an item of loans to Mr. Sonduck $1,500.00; payment, the next rather is a loan to M. R. Arnold $3,400.00; the next is a payment to the bank amounting to $5,637.68; the next is cashier's check number 125406 for $5,000.00; the next is a payment to the bank for cashier's check number 125175 in the name of A. F. McFee for $6,000.00; the next item is an additional investment in the North Idaho Sales Company $5,000.00; the next an investment in the Foresters Club in Lewiston, $3,000.00 making total payments of $87,787.68, these items were paid from sources that we can account for, not deposited in the bank which could have been used to make these payments; the next item on the exhibit

(Testimony of Ray F. Olsen.)

is $1,000.00 received from Sonduck at the close of 1945, carried in 1945; the next is $15,000.00 withdrawn from the Foresters Club at Lewiston which could have been used; the next item rents of $544.02; the next is loss of machines $473.90 making a total of expenditures which cannot be accounted $70,769.76.

Q. According to your computation what was Mr. McFee's net income for that year?

A. $110,448.77. [228]

Q. And what did he report on the tax return filed with the tax collector? A. $39,679.01.

Q. You obtained those figures from the exhibits here? A. Yes, sir.

Q. Have you computed Mr. McFee's net income for the years 1945 and 1946 by another method?

A. Yes, sir.

Q. What method is that?

A. By comparison of net worth.

Q. Will you explain to the jury what comparison of net worth is?

A. Comparison of net worth is to determine the net worth of an individual at the beginning of the year and the net worth of that individual at the close of the year and figure the increase during the year of course is accounted for by income.

Q. You do have those computations with you?

A. Yes, I have.

Q. Will you hand the net worth computations for the year 1945 to the Bailiff? A. Yes, sir.

(Testimony of Ray F. Olsen.)

Mr. Patten: I will ask that this be marked as Exhibit Number 49.

Q. Is that your computation?

A. That is correct. [229]

Q. Did you prepare this from figures you obtained from the same source that you mentioned that you made the other computation from?

A. Yes, sir.

Mr. Patten: We offer this in evidence at this time.

Mr. Purdy: We have no objection to that.

The Court: It may be admitted.

Q. Have you a similar computation of Mr. McFee's income for the year 1946?

A. Yes, I have.

Q. Do you have those computations with you?

A. Yes, sir.

Mr. Patten: I will ask that this be marked as Exhibit Number 50 and I offer it in evidence.

Mr. Purdy: We have no objection.

The Court: It may be admitted.

Q. Now Mr. Olsen, will you please step down here. According to your examination of the sources which you previously made, how much was Mr. McFee's net worth at the beginning of 1945?

A. $185,325.50.

Q. How much was he worth at the end of the year? A. $291,135.20.

Q. How much did this net worth increase?

A. $105,809.70.

Q. How much did he spend for purposes and

(Testimony of Ray F. Olsen.)

which do reflect on the accounts? [230]

A. $8,692.60 in personal items.

Q. Where did you get those figures?

A. From the drawing account.

Q. And what does that make his total increase in wealth, that year?

A. Well there is a little item, adjustments and that amounts to $152.82 making a total income of $114,654.48.

Q. Was all that taxable? A. No, sir.

Q. How much was not taxable?

A. $8,409.38, less the amount of $1,167.20.

Q. Making a taxable net income of how much?

A. $105,077.90.

Q. Does that agree with the result you reached in the expenditure computation? A. Yes, sir.

Q. What was Mr. McFee's net worth at the beginning of the year 1946 according to the computation you have now? A. $291,135.20.

Q. How much at the end of that year?

A. $373,236.81.

Q. What money did he spend which was not reflected in the increase in his wealth?

A. $4,818.48.

Q. Where did you get that figure?

A. Personal expenditures in the drawing account. [231]

Q. And the next item as shown on that exhibit?

A. $12,500.00 to E. M. Stern; $3,000.00 to W. F. Murphy; deposit with E. M. Stern $2,500.00; to the United States Court, Bismarck, North Dakota,

(Testimony of Ray F. Olsen.)

$7,500.00; to attorney Stern for Francis Murphy $1,500.00.

Q. What does that indicate the total income was for that year?

A. The total after adjustments of $2,203.27 leaves $111,716.82.

Q. Was all of that taxable? A. No.

Q. What was the amount not taxable?

A. $794.15 capital gain which was eliminated and $473.90 loss of machines.

Q. And what does your computation indicate was Mr. McFee's net income? A. $110,448.77.

Q. Does that agree with his income as computed by the expenditures method? A. Yes, it does.

Q. Without reading the figures just read the items which are included in McFee's net worth which are in those figures.

A. Checking account in the Wallace First National Bank; Stocks owned, mining and others; real estate, rental property; Government bonds; loans receivable; cashier's checks; Dan Murphy Lease investment and Dan Mac Lease investment; Foresters Club, Coeur d' Alene, investment account and contracts; Gem Club Athol investment; Samuals Hotel; [232] miscellaneous receivables, check of the Foresters Club at Lewiston, that is $15,000.00 not deposited; check from Sonduck $1,000.00 not deposited; investment in Foresters Club at Lewiston; North Idaho Sales Company investment account.

Q. How much does it show in property that McFee owned at the beginning and the end of 1945?

(Testimony of Ray F. Olsen.)

A. This is 1946.

Q. Yes, 1946.

A. At the beginning, $310,156.20.

Q. How much did he owe?

A. He owed, not identified on the books of the North Idaho Sales, $16,610.87 and investment for depreciation which reduced the assets $2,410.13, total liabilities and reserves $19,021.00.

Q. And what does that show his net worth at the beginning of the year? A. $291,135.20.

Q. And that is the figure that you have up there on the blackboard? A. That is one.

Q. And at the close of the year?

A. At the close of the year, what do you want?

Q. What did he own?

A. Including the investment in the Samuels Hotel he owned $388,425.13 against which there was a liabilities of $10,973.19, this was notes payable, and there was reserve [233] for depreciation $4,-215.13, a total of $15,188.32 or a net worth of $373,236.81; that is this figure here (indicating).

Q. Mr. Olsen, if Mr. McFee had reported a net income of $105,077.90 on his tax return which he filed for the year 1945 what would his income tax have been? A. $71,076.35.

Q. What income tax did he report?

A. $10,021.05.

Q. If Mr. McFee had reported an income of $110,448.77 on the income tax return he filed for the year 1946 what would his income tax have been?

A. $72,091.30.

(Testimony of Ray F. Olsen.)

Q. What income tax did he report?

A. $18,091.35.

Mr. Patten: You may cross-examine.

The Court: I think we will take a fifteen minute recess at this time.

April 28, 1952, 11:15 a.m.

Cross-Examination

Q. (By Mr. Emigh): How long have you been connected with the Internal Revenue Department?

A. 10 years, approximately.

Q. In what particular division?

A. Internal Revenue Agent in Charge.

Q. What are the duties of that department?

A. To examine tax returns and determine tax liability.

Q. Are you employed in what is known as the Technical Staff? A. No.

Q. When you testified that the expenditures in 1945 and 1946 were in excess of the income—of the reported income, you implied that those expenditures were paid out of taxable income.

A. That is correct.

Q. Now, Mr. Olsen, you don't know what they were paid out of, that is, as to whether it was money available—that is, to your knowledge money which was available at the beginning of the year 1945 or not.

A. We made an examination and we determined all of the income which was reported and all of the assets and it was determined that he had on hand

(Testimony of Ray F. Olsen.)

on January 1, 1945 all of the assets which he had at that time and then we determined whether he had known taxable income, inheritance, gifts and the like which could have accounted for those expenditures.

Q. You determined that from his books which have been put in evidence here?

A. We determined it from his books. [235]

Q. And the bank accounts which have been referred to?

A. That is correct, but not only from his books.

Q. I am asking again Mr. Olsen, if from your own knowledge outside of these opinions which you give, you had any knowledge from the books that you examined that he didn't have ample funds from other cash reserves to make these expenditures?

A. That is correct.

Q. You could not testify of your own knowledge could you? A. Yes, sir.

Q. How far back did you base your determination as to the net worth on January 1, 1945, how far back did you use his books to determine that?

A. 1931, December, '31.

Q. '31, how did you determine what he was worth on January 1, 1941?

A. Well, from the record and from his books, the Court records and county records which we could find throughout the country.

Q. And from what records or books?

A. The records of the North Idaho Sales Com-

(Testimony of Ray F. Olsen.)

pany and all records which have been available to us.

Q. The records referred to in Court which you testified to?

A. And any hearsay evidence that we could find which would establish that he might have had assets at the beginning of the year. [236]

Q. You had no cash statement from him as to any net worth on the first of the year 1941?

A. He didn't give us a statement, no sir.

Q. You had no statement that he had given to any bank at that time? A. No, sir.

Q. No statement of his assets that he had given anyone, nothing except the conclusion that you drew from these reports? A. That is correct.

Q. Your testimony a while ago was that your conclusion was based upon his known assets, that is, known to your department?

A. That is correct.

Q. Yesterday, or rather on Friday, in relation to exhibits numbered 17, 18 and 19 you testified that they were paid out of income. Will you examine those exhibits and tell what appears on them that would justify you in stating to this jury that they were paid out of income?

A. The first one, from the Wallace branch of the Idaho First National Bank, this is a cashier's check number 124697, that is Exhibit Number 17. There is no record in McFee's books in which he posted his income to indicate where this money came from.

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(Testimony of Ray F. Olsen.)

Q. There is nothing there to indicate where it came from? A. And he spent this. [237]

Q. You say it was not reflected in the books in which he posted his income tax returns.

A. That is right.

Q. It could have been from cash he had in reserve that was not reflected in the income tax report for the year in question?

A. The only source——

Q. ——Can you answer that question yes or no?

A. It could have come from income which he held.

Q. It could have come from income from earlier years or cash that he had at the beginning of this period upon which you base your examination.

A. There was no indication in January 31 or 41 that he had any cash on hand other than what McFee told us that he had.

Q. Just wait a minute, you have testified that you had no knowledge of what money that McFee had at the beginning of 1941.

A. Yes, we had what he told us.

Q. You had no record of his money or his worth except what he told you? A. That is correct.

Q. And these items, if there were any such funds, these could have been as well purchased or paid out of these funds as any others?

A. Yes, sir, that is correct.

Q. Do you have any knowledge that McFee had other funds besides [238] those reported on these income tax returns? A. No.

(Testimony of Ray F. Olsen.)

Q. Did you have any knowledge that he did not have other businesses? A. No, sir.

Q. All of these items of expenditures that you have testified about could have been paid out of money in his possession in 1941, could they not?

A. If he had sufficient money to pay them.

Q. At the beginning of that time?

A. Yes, sir.

Q. Were a number of Mr. McFee's businesses prior to 1945 partnership businesses?

A. A part of them were, yes.

Q. You have testified here as to all of the search that you made concerning moneys available to Mr. McFee at the beginning of 1945?

A. That is correct.

Q. The individual income would not be shown on the partnership returns—that is income outside of the partnership? A. It would not.

Q. As I understand it, any income return only shows the income for that current year, that is all that is required to be shown?

A. That is right.

Q. It does not have to show a financial statement of any kind [239] other than the receipts and disbursements of taxable money and disbursements?

A. That is right.

Q. You have mentioned a statement which you attribute to Mr. McFee about some $50,000.00 in cash? A. That is correct.

Q. And you are basing a part of your conclusion and your determination in this case on that state-

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(Testimony of Ray F. Olsen.)

ment are you not? A. That is right.

Q. Assuming that Mr. McFee had, prior to 1941 or prior to any other year, $200,000.00 not used in the businesses, would that reflect on his income tax return? A. No.

Mr. Emigh: I think that is all.

Redirect Examination

Q. (By Mr. Patten): You testified that you did not have a statement of Mr. McFee's cash condition as of January 1, 1942?

A. That is correct.

Q. Did you ask Mr. McFee for any such statement? A. Yes, we did.

Q. For 1942 or 1941 or any other year?

A. Yes, we did. [240]

Q. How many times did you ask for such a statement?

Mr. Emigh: We object to that as incompetent, irrelevant and immaterial, it is a right of the defendant not to disclose or to discuss those matters.

The Court: He may answer.

A. I only remember one specific time which was with Mr. Rice, we talked to him at other times but I don't remember in detail the conversations, we were not making an examination as revenue agents at that time and it is not the practice to make a statement of every detail of the conversation, all we are attempting to do is to determine their income.

Q. Did you ever receive such a statement from

(Testimony of Ray F. Olsen.)

Mr. McFee? A. No, sir.

Q. How much did you say Mr. McFee told you that he had at that time? A. $50,000.00.

Q. Then you assumed that Mr. McFee had this $50,000.00 on that date, could he have it on January 1, 1945? A. No, sir.

Q. Why?

A. Because he had unaccounted expenditures in 1943 and 1944 that would have used it up.

Mr. Patten: That is all.

Re-Cross-Examination [241]

Q. (By Mr. Emigh): But you are assuming that he didn't receive any other income in 1943 and 1944? A. I didn't find it.

Q. You cannot say that he didn't have it before that time? A. He didn't report it.

Q. You cannot say that he didn't receive it and not report it in those years?

A. We didn't find it.

Q. I think in relation to Exhibits 1 and 2 that you testified that it was reported—I believe that you read the tax item in place of the income item?

A. On which one?

Q. I will withdraw that question——

A. ——Under the income tax report of 1945 the income is reported as $25,166.67 and the tax liability is $10,021.05.

Q. And that is a correct statement as to what is on the exhibit? A. Yes, sir.

Q. Now will you read Exhibit Number 2, the same items?

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(Testimony of Ray F. Olsen.)

A. Net income $39,679.01 and the tax liability $18,091.35.

Q. Now, Mr. Olsen—withdraw that—and that is a correct statement as it appears on the exhibit?

A. That is the figure on the exhibit.

Q. Now, in your redirect examination you referred to a conversation with Mr. Rice being present? A. That is correct. [242]

Q. That is the only conversation you had or rather the only statement made by Mr. McFee?

A. That is right.

Q. You didn't request him to give a statement of his assets at that time? A. I did not.

Q. That request was not made in your presence?

A. I think Mr. Rice did that.

Q. Asked for a statement of all his assets?

A. Yes, sir.

Q. Was that when he referred to the $50,000.00?

A. Yes, sir.

Q. In your testimony a while ago you said that you just asked him to explain those expenditures?

A. That is what I did ask him.

Q. And he referred to the $50,000.00?

A. That is correct.

Mr. Emigh: I believe that is all.

The Court: How much cash or currency would Mr. McFee have to have on hand at the start of 1945 to make up the shortage that you found was unreported?

A. Approximately $150,000.00.

The Court: That is all I have.

Mr. Patten: At this I would like to offer in evidence Exhibits Number 6, 7, 10 and 20 previously identified in evidence here. [243]

The Court: They may be admitted.

CLIFFORD M. RICE

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): What is your occupation —first Mr. Rice where do you live?

A. Spokane, Washington.

Q. What is the address?

A. South 3921 Lamont.

Q. And what is your occupation?

A. Special Agent, Internal Revenue Department.

Q. How long have you been employed by the Internal Revenue Department?

A. Since 1938, 13 and one-half years.

Q. What was your occupation prior to that time?

A. Public accountant for 3 and one half years.

Q. And before that?

A. I was an accountant in a hospital for nine years and a couple of years in banking, general ledger work.

Q. Do you know the defendant in this proceeding, Mr. McFee? A. Yes, sir.

Q. In what connection did you meet Mr. McFee?

A. In connection with the examination of the

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(Testimony of Clifford M. Rice.)

income tax returns for 1942 through 1946.

Q. When and where did you meet him?

A. As I recall it was on May 15 or 16 in his office at Wallace, Idaho.

Q. You say May 15 or 16, what year was that?

A. 1947.

Q. That was the time you met Mr. McFee?

A. Yes, sir.

Q. And what transpired at that time, and at that meeting?

A. I was there with Internal Revenue Agent Olsen who has just previously testified——

Q. ——I asked, Mr. Rice what transpired at the meeting?

A. Yes, we were there to make an investigation of his tax returns—Mr. McFee's tax returns for the years just mentioned. The books records had been made available in McFee's place of business, in the back end of the room; his bookkeeper, Miss Poska made the place available to us. On May 15 or 16, as I say Mr. McFee asked if we were being taken care of——

Mr. Emigh: That was brought out without a question and I object to it as an extra-judicial admission or a statement on the part of the defendant and at this time there is no sufficient proof of the corpus delicti for it, that is, that statement to be competent.

The Court: It seems to me that it is very unimportant, [245] however I think I will let it stand, the jury can decide if it is important or not. The

(Testimony of Clifford M. Rice.)

answer may stand, you may proceed.

Q. What records did Mr. McFee or his employe furnish to you?

A. The records of the North Idaho Sales Company, the general ledger was not there at that time, Mr. Emasio brought that over from his office and the cash journal was at the North Idaho Sales Company office and at the place they made available they consolidated those records for us to work with.

Q. Did Mr. McFee furnish you the route slips or the collection books of the collection on the slot machines? A. No, sir.

Q. Have you seen them since that time?

A. No, unless it was introduced here, I didn't examine that book.

Q. When was the next time you saw Mr. McFee?

A. It was in my office in Spokane on June 11, 1947, after I had asked him to come in.

Q. Any one else present at that meeting?

A. No, sir.

Q. And what did you say to Mr. McFee and what, if anything, did he say to you?

Mr. Emigh: May this conversation that is inquired about at this time and any statements made by the defendant McFee at that time be objected to for the reason upon the [246] ground that they are in the nature of extra-judicial statements or admissions and not competent to prove the corpus delicti and the corpus delicti is not proven as yet.

The Court: Any statements concerning 1946 or

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(Testimony of Clifford M. Rice.)

1947 or years prior you think are not admissible?

Mr. Emigh: I think that they would be and are in the nature of extra-judicial statements, if any were made by the defendant.

The Court: What do you mean by extra-judicial statements?

Mr. Emigh: Made outside of the Court proceeding——

The Court: ——It is your contention that no admission made by the defendant in connection with this kind of matter is admissible?

Mr. Emigh: I think they are not competent to establish the corpus delicti, the corpus delicti must be proven in other ways.

The Court: The objection is overruled.

Q. Now, going to conversation of June 11, 1947 will you tell us what was said at that conversation, what you said to Mr. McFee and what Mr. McFee said to you, if anything?

A. As is customary I advised him of his rights and I advised him as to the matter of self-incrimination. I discussed with him the matter of the large payments, told him of large payments that had come to my attention, particularly at St. Paul, Minnesota in 1944 and the large payments to [247] the United States Court at Bismarck, North Dakota in 1946 and the loans, I also mentioned the loans that were made allegedly to Mr. Sonduck, that had come to my knowledge in 1945 and 1946, that is, the loans were made at those times. I told him of two days that I had been in Wallace and

(Testimony of Clifford M. Rice.)

I had not found where those payments could be accounted for from the books of the North Idaho Sales Company and Mr. McFee told me at that time of the Foresters Club, he told me where those books were and also he mentioned the Gem Club and I asked him also at that time if he had a personal bank account and he said that he had a personal checking account at the First National Bank at Wallace. He said that I could check further on his other records. I told him that I would do that and that I would also check through his personal checking account.

Q. Did you check these records?

A. Yes, sir.

Q. Did you account for the large expenditures?

A. I did not.

Q. Where did you next meet Mr. McFee?

A. I believe it was on November 5, 1947. I was checking the personal bank account of Mr. McFee in Wallace and I analyzed that completely, both the deposits and the checks. A part of the work I did at the bank and in Mr. McFee's office. Mr. McFee was in at one time.

Q. Did you have any important conversation?

A. Well, not in connection with this matter, just passing remarks, something was said about Mr. Petrillo and other matters of that nature.

Q. What was the next conversation, if any, with Mr. McFee?

A. That was in February, February 16, 1948.

Q. Who was present and where was it?

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(Testimony of Clifford M. Rice.)

A. That was in Mr. Emasio's office in Wallace at about 2:00 p.m. on that day, that was by appointment made prior to that time.

Q. And who was present?

A. Mr. McFee, Mr. Emasio and Agent Olsen and myself.

Q. Will you tell the Court and jury what, if anything, Mr. McFee said to you at that conversation and what you said to him?

Mr. Emigh: We object to any statement made by Mr. McFee, that would be extra-judicial in character and not competent to prove the corpus delicti and it has not been established at this time.

The Court: He may answer.

A. Well again the purpose was to get at these large payments if we could, we had them confronting us and Revenue Agent Olsen and I talked to him and asked the source of the Sonduck loans in 1945 and 1946 also the large investments in the Dan Mac Lease in 1945 and the additional amount, not large, in 1946; we asked about the payment in the United States Court, the payment in St. Paul in 1944 and in [249] Bismarck in 1946 also another item at issue related to 1943. We could not account for something in excess of $100,000.00 which had been made for merchandise, as I recall the figure it was somewhere around $114,000.00 but I am not certain of that exact amount. Mr. McFee explained at that time that the money for the merchandise could be accounted for he believed through the Foresters Club at Lewiston and Coeur d'Alene.

(Testimony of Clifford M. Rice.)

Now, the other items he stated that he had approximately $50,000.00 at the beginning of the period that we had under investigation,—that is, at the beginning of the year 1942, from which the other payments could have been made.

The Court: We will recess at this time until 2:00 o'clock.

April 28, 1952, 2:00 o'clock p.m.

Q. I believe before the recess that you had finished the conversation that you had with the defendant and Mr. Emasio on February 16, 1948. Did you have any further conversations with Mr. McFee? A. Yes, June 14, 1948.

Q. Who was present at that conversation?

A. Mr. McFee, Internal Revenue Agent Olsen and myself. [250]

Q. And where was that?

A. That was in the hotel room, I think it was in my room I know I had driven in around noon and made an appointment with Mr. McFee.

Q. Which hotel was that?

A. The Samuals.

Q. What did you say to Mr. McFee and what if anything did Mr. McFee say to you at that conversation?

Mr. Emigh: That is objected to on the ground and for the reason that it manifestly calls for an extra-judicial statement or admission or confession.

The Court: There is no contention on your part that Mr. McFee was under arrest at that time or

(Testimony of Clifford M. Rice.)

any criminal proceedings had been started against him.

Mr. Emigh: If he was under investigation the same thing applies.

The Court: There is no contention that he was threatened with any arrest.

Mr. Emigh: Only that he was under investigation.

The Court: I understand that this witness advised him of his rights and that he was investigating that matter and that anything he said might be used against him.

Mr. Emigh: My position is the same as to the previous conversation that I objected to, as being an extra-judicial statement and it cannot be used to prove the corpus delicti.

The Court: I don't feel that this comes within the [251] rule of a person testifying against himself. You can cross examine the witness if you care to.

Mr. Emigh: I think the rule I have in mind provides for this objection.

The Court: If there is such a rule I think it is time I found it out. The jury will be excused for a moment.

(In the absence of the jury.)

Mr. Patten: If the rule is as counsel contends I am sure the corpus delicti has been proved at this time. We have proved the false return.

The Court: I think the objection will be over-

(Testimony of Clifford M. Rice.)

ruled and I will permit the witness to answer. The jury may be recalled.

(In the presence of the jury.)

Q. You may state the place and time of the conversation.

A. June 14, 1948, at the Samuals Hotel, Wallace, Idaho.

Q. Who was present?

A. Agent Olsen, Mr. McFee and myself.

Q. What did Mr. McFee say to you and what did you say to him?

A. I told Mr. McFee that as yet we had not been able to account for the large expenditures, that I had talked to him about before and I asked whether he might have received some inheritance in past years, prior to 1942 and he said that he hadn't. I asked if he had any source from which he could have made those payments and he said that he had cash before 1942. I asked him how it could be proved, that his [252] mere statement as I had told him we could not take just his statement, he told me that he didn't know just how he could prove it and I told him that the next best step would be his sworn statement which would be better than just a verbal statement and I asked him if he could give an affidavit or a sworn statement that he had this cash. He was still mentioning the $50,000.00 back in 1942. As I recall Mr. McFee said that he would consider that and as far as the conversation in the hotel room is concerned that

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(Testimony of Clifford M. Rice.)

I think is the substance of it. I did have a further conversation a few minutes later.

Q. Where was that?

A. That was in front of the Idaho First National Bank on the way over to the North Idaho Sales Company office. Mr. Olsen and I left the hotel immediately and went over to the office and met Mr. McFee in front of the Idaho First National Bank and Mr. McFee mentioned at that time——

Mr. Emigh: ——For the record we will object to this second statement in relation to what Mr. McFee said on the ground that it is in the nature of an extra-judicial statement and is not competent until the corpus delicti is proven by other competent evidence.

The Court: He may answer.

Q. What did Mr. McFee say to you and what did you say to him?

A. He said that he was leaving soon for Seattle, I think that afternoon and he asked whether I knew the man who ran the [253] Turf Club or he may have mentioned Mr. Churdsland and I said that I knew Mr. Oscar Churdsland and he said that Mr. Churdsland could tell me that he had large sums of money at the time that he said that is, prior to 1942. At that time Mr. McFee mentioned again the amount of $50,000.00 and he said that he didn't think that he could prove it himself but he thought that Mr. Churdsland could tell me that.

Q. Did you have any correspondence with Mr. McFee or did you see Mr. McFee later?

(Testimony of Clifford M. Rice.)

A. Yes, sir, about ten days later I saw him,—that was on June 14 that I just spoke of and I saw him again on June 24.

Q. Where was that?

A. At the Gem Cafe at Wallace.

Q. Who was present at that time?

A. Internal Agent Olsen and I were having lunch and Mr. McFee came to the cafe. I called him for an appointment before I got to town and we proceeded to the Samuals Hotel up to Mr. McFee's apartment in the hotel.

Q. And what was the conversation at that time?

Mr. Emigh: I make the same objection as I made to the preceding question.

The Court: The same ruling.

A. At that time in that room we sat down and opened up our papers and went over the various assets that had been of [254] record on the books of the North Idaho Sales Company, which had come out of those books after the partnership was dissolved. We went down all of the items one by one to determine whether he had those assets at the end of 1946. There were two items of stock that showed on the 1944 return, that showed that he had received $2,550.00 in proceeds from the sale of this stock. These two items were the only ones that Mr. McFee stated that he didn't have at the end of 1946. Mr. McFee stated that he talked to Mr. Churdsland that he could tell me that he knew that Mr. McFee had money prior to 1942,—prior to the beginning of 1942.

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(Testimony of Clifford M. Rice.)

Q. Is that the conversation at that time?

A. That is the substance of the conversation at that time.

Q. Did you have any correspondence with Mr. McFee later?

A. I wrote him a letter on September 8, 1948.

Q. Did you keep a copy of that letter?

A. Yes, sir, I have a copy of it.

Mr. Patten: I would like to have this marked as Plaintiff's Exhibit No. 51.

Q. Can you identify that document, Mr. Rice, Exhibit No. 51 which has been handed to you?

A. I mentioned September 8, 1948, this is September 7, 1948, it is dated at Spokane, Washington.

Q. Is that a copy of the letter that you referred to?

A. A copy of the letter directed to Mr. A. F. McFee, Wallace, [255] Idaho.

Q. What did you do with the original of that letter? A. I mailed it to Mr. McFee.

Q. Was it in a properly stamped envelope?

A. It was in a franked envelope of the Government, it was addressed to Mr. A. F. McFee, at Wallace, Idaho.

Q. And it was properly mailed, was it?

A. Yes, sir, it was.

Mr. Patten: We offer this in evidence at this time as Exhibit No. 51.

Mr. Emigh: To which we object first that it calls for an extra-judicial document, it is no proof of the corpus delicti and it is incompetent for that

(Testimony of Clifford M. Rice.)

purpose. We have no way of knowing what further use may be made of this exhibit and further it impinges on the right, the constitutional right of this defendant to make a statement which might incriminate him.

The Court: It may be admitted.

Mr. Patten: We request permission to read this to the jury at this time.

The Court: You may read it to the jury.

Mr. Patten:

"Spokane, Washington, September 7, 1948.

Mr. A. F. McFee

Wallace, Idaho [256]

In re: Income taxes

Dear Mr. McFee:

Sometime ago you advised Internal Revenue Agent Olsen and me that you wished to submit an affidavit in connection with the above entitled matter in order to place under oath certain of your statements to us relative to cash which you said you had on hand some years ago. We have not as yet received your affidavit nor heard anything from you relative thereto.

In view of the fact that we told you that such an affidavit, if submitted by you, would be incorporated into our reports on your case for whatever consideration could be given the statements made therein, it is desired that you advise as to whether you still wish to submit your affidavit in connection with such matter.

Please be advised that it is not compulsory that

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(Testimony of Clifford M. Rice.)

you submit such an affidavit, your submitting same must be entirely voluntary on your part. However, if you do wish to submit same to us and for certain reasons desire more time in which to prepare same or have it prepared, we will appreciate your advising as to the approximate amount of time you will yet need for its preparation.

Then there is the name Clifford M. Rice, Special Agent.

Q. Did you receive a response to that?

A. Yes, through Attorney Clayton Keane.

Q. Did you ever receive the statement referred to in the [257] letter? A. No, sir.

Q. Did you have any further conversations with Mr. McFee? A. Yes.

Q. When was the next conversation that you had? A. April 25, 1949.

Q. Where did that conversation occur and who was present?

A. Only Mr. McFee and I that was about one-half block from his place of business in Wallace, Idaho, at approximately noon on April 25th.

Q. What, if anything, did Mr. McFee say to you and what did you say to him?

Mr. Emigh: The same objection as was made to other like questions.

The Court: The same ruling.

A. I told Mr. McFee when I met him that I was just walking over to see him. When we met I told him that I understood that he was not going to give us a sworn statement; Mr. McFee's only

(Testimony of Clifford M. Rice.)

comment to me was that he said he probably should not do any more talking as it appeared that he was about to be indicted.

Q. You mentioned Mr. Oscar Churdsland?

A. Yes.

Q. Did you see Mr. Churdsland? A. Yes.

Q. When? [258]

A. August 21, 1948, at Seattle, Washington, in the Turf Club.

Q. Did he furnish you any information in regard to or did he direct you to any record relative to the amount of cash Mr. McFee had on hand at the close of 1941? A. He did not.

Q. Have you examined the books and records of Mr. McFee's enterprises? A. Yes, sir, I have.

Q. Particularly the books and records of the North Idaho Sales Company? A. Yes, sir.

Q. Have you examined the records which have been introduced in evidence here, as exhibits numbered 3 through to number 13,—Exhibit No. 3 is Mr. McFee's income tax return for the year 1942; Exhibit No. 4 is Mr. McFee's income tax return for the year '43; Exhibit No. 5 is the tax return for Mr. McFee for the year 1944; Exhibit No. 6 is the partnership tax return for the North Idaho Sales Company of Wallace, Idaho, for the year '42; 7 is the partnership tax return for the North Idaho Sales Company for the year '43; Exhibit No. 8 is the partnership tax return for the Dan Mac Lease for 1945; No. 9 is the partnership return for the Dan Mac Lease for the year '46; No. 10 is the

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(Testimony of Clifford M. Rice.)

certificate of assessment and payments made by A. F. McFee; No. 11 is the certificate of assessments and payments,—the same as No. 10, Exhibit [259] No. 12 is the same for Dorothy McFee; Exhibit No. 13 is the personal bank account of A. F. McFee at the First National Bank of Wallace, Idaho?

A. Yes, I have examined those.

Q. Do you know the amounts of income under the North Idaho Sales Company reports for 1936 through 1941? A. Yes, sir.

Q. On the basis of the reported income of Mr. McFee and the North Idaho Sales Company for the years 1936 through 1944 and on the basis of expenditures shown on the books, the bank accounts and the other accounts mentioned, have you computed the amounts of funds he could have had available to him on January 1, 1945, in addition to those shown in the businesses and the bank accounts?

Mr. Emigh: We object to that as it calls for a conclusion of the witness and for an opinion on matters not appearing in the exhibits as to income and expenses, tabulations and other items of a like nature.

The Court: He may answer.

A. Yes, sir.

Q. Do you have that exhibit with you?

A. Yes, sir.

Q. Plaintiff's Exhibit No. 52 is a computation which you have prepared from the sources which you have mentioned, is it? A. Yes, sir. [260]

(Testimony of Clifford M. Rice.)

Mr. Patten: We offer this in evidence at this time.

Mr. Emigh: We object to that as incompetent, irrelevant and immaterial and it is based in part on exhibits in Court which do not give the information upon which this conclusion is based.

The Court: I think I will admit the exhibit.

Q. Will you step down here and tell us what this first figure is? A. That is $2,000.00.

Q. And what is that?

A. That I used as the ultimate investment in the partnership beginning 1936.

Q. And the next figure, what is that?

A. That is the income reported 1936 through 1944.

Q. That is the total? A. Yes, sir.

Q. You say that is the income reported from 1936 through 1944? A. Yes, sir.

Q. Now, as I understand it from the years 1936 to 1943 the North Idaho Sales Company was a partnership in which Mr. A. F. McFee and his daughter Dorothy were equal partners?

A. Yes, sir.

Q. Are the figures which you used representative of the entire partnership earnings or Mr. McFee's one-half?

A. The entire partnership earnings. [261]

Q. And what is the next figure?

A. $342,178.98, the income reported plus the investment at the beginning.

Q. The next item?

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(Testimony of Clifford M. Rice.)

A. That figure, $166,440.46 is the investment in North Idaho Sales Company and other net worth of Mr. McFee at the end of the year 1944.

Q. The subtraction of the investment and net worth at the end from the figure which represents the earnings plus the investment gives you what?

A. $175,738.52.

Q. And what is that?

A. That is drawing from the business or the amount available for drawing.

Q. Is that the actual drawings from the business as taken from the books?

A. I didn't have the books to examine through from 1936 to 1941.

Q. Is that the maximum amount available?

A. That is the maximum amount.

Q. What are these figures (indicating) this list?

A. That is the personal and living expenditures from 1936 through 1944, income tax paid to the Federal Government and other items, the income tax paid to the Government is $135,714.64.

Q. Where did you obtain that figure? [262]

A. That is obtained from different sources through that period. For the period 1936 through 1941 there is included in there income tax payments which I took from the tax payments exhibits, those assessments and payments schedule in evidence here and the 1942 item of taxes which are included in that figure I took from the same place, the 1943 and 1944 figure I obtained these from the books of the North Idaho Sales Company and then I be-

(Testimony of Clifford M. Rice.)

lieve there was one or two payments that came out of his personal bank account.

Q. Now, the next figure?

A. That is income tax paid to the State, $8,276.34; this I obtained directly from the books of the North Idaho Sales Company, I don't recall that there was any of this payment out of the personal bank account.

Q. The next is titled insurance premiums paid.

A. Yes, $2,518.85 from the books of the North Idaho Sales Company, I don't recall that there were any of those payments out of the personal bank account.

Q. The next item?

A. That is $17,855.20 miscellaneous expenditures.

Q. Where did you obtain that?

A. In the year 1942 I obtained from the books the total amounts of his drawings from the North Idaho Sales Company and from those exhibits, assessments and payments of taxes, I eliminated this payment (indicating) and added the figure which I didn't total, from the books, that is, in the [263] miscellaneous figure there was $65,598.28 that is, of this total. For the year 1942 and for 1943 and '44 I completely analyzed the disbursements on the drawing on the books and I think there was a small bank charge of nine dollars and some odd cents that came out of the bank account.

Q. How long is the list of those items?

A. It is not extensive.

Q. Which makes a total of what?

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(Testimony of Clifford M. Rice.)

A. $17,855.20.

Q. This is the total figure?

A. Yes, there were checks to Dorothy McFee $4,060.00, these relate to 1943 and 1944; checks to A. F. McFee $4,800.00 those relate to the years 1943 and 1944; those checks were $200.00 per month or $2,400.00 in each year and then there were various living expenses, items on these records were totaled at $886.25; then there were a few checks on the drawing account that were unidentified as to purpose, one for $62.30 to the Pentulana Company, a check for $1,400.00 the name as I could read it Beandine, there was one or more checks grouped that went to Emil Plifter, $100.50, there were also various items, laundry and such as that amounting to $441.35, there was one item in there for $500.00 and that item was indicated on the books as a Federal fine. There were as I mentioned, back here in 1942,—I didn't break it down except as to taxes, payment of taxes and the $9.52 in 1944 in the bank account, charges [264] that were entered and itemized as $5,604.80, the books would show $5,595.98.

Q. The books show this total here (indicating)?

A. Yes, sir, $17,855.20, the books and the bank account.

Q. The next item on the exhibit $11,195.71 will you explain that?

A. For the years 1936 to 1941, that item is $11,195.71 that relates to those six years. I took the beginning investment for that period,—that

(Testimony of Clifford M. Rice.)

doesn't include 1942, '43 and '44,—the beginning investment and add to that profits of $77,994.73 and subtract from that the known investment at the end of the year 1941 and that would have left Mr. McFee and also his daughter $13,999.35 available to expend.

Q. For what?

A. Personal expenditures, personal drawings.

Q. To draw for what purpose?

A. For food and living expenses, now, the exhibit shows that $2,803.64 was spent for income taxes and that leaves $11,195.71 which could have been used for personal or living expenses, that is the item right here (indicating).

Q. By whom and for what years, you say that could have been used?

A. For the six years by Mr. McFee and his daughter.

Q. Did Mr. McFee and his daughter have any other sources of income shown on the return to use for living beside that amount?

A. Yes, $910.00 Mr. McFee had on his return for 1936, that [265] was the Green Grocery item for the period of June 1st to June 30th, 1936.

Q. And what is this last item on the exhibit?

A. $177.78, that relates entirely to the year 1944, drawing and payments out of the personal bank account.

Q. How much could Mr. McFee have had saved from his reported income for years 1936 to 1944?

A. He had available to him in addition to the

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(Testimony of Clifford M. Rice.)

funds in the business, this $17,855.20; there is the item of $2,800.00 in checks to Mr. McFee, those are regular $200.00 monthly checks, if he did save any of the amount of that money, if he had not spent all of this to live during 1936 to 1941, he would have the difference, that would have been available at the end of 1944.

Mr. Patten: I think you may cross examine.

Cross Examination

Q. (By Mr. Emigh): Mr. Rice, you made no personal investigation in 1936 as to the assets of Mr. McFee at the beginning of that year?

A. No, not definitely at that time.

Q. You didn't make any determination as to whether or not on January 1, 1936, he had other assets or other property available which did not appear on the books through the period that you have testified to? [266]

A. I talked to him regarding the resources and all questions that came up.

Q. I am speaking of your investigation in 1936?

A. My investigation,——

Q. ——Let me finish, I am speaking of your investigation in 1936 and not the statements which you have testified to since?

A. Through this determination I have, yes, sir.

Q. From those books that you have spoken of from which you made your determination, did you make any independent investigation to determine whether or not he had other assets than you found

(Testimony of Clifford M. Rice.)

on the books at the beginning of 1936?

A. I made some investigation through checking various records to see whether he sold anything during the period we are interested in.

Q. How far back did the records go?

A. We started with 1942.

Q. That is the only investigation that you made?

A. No, I talked to certain persons as to whether——

Q. ——Now, I don't want any hearsay I want your actual knowledge.

A. Independent investigation?

Q. Your knowledge, what you found.

Mr. Patten: You asked what investigation he made.

Mr. Emigh: He told us that he made the investigation starting in 1942. [267]

The Court: His investigation is what he is testifying to at this time, I understand that you are trying now to limit him. I think his investigation goes to everything concerning Mr. McFee of course, if you want to confine it to one particular item or one year I think probably you should do that and ask your questions on that.

Q. Did you ascertain,—you made no investigation in 1936? A. Not at that time, no.

Q. Not until 1942?

A. Our investigation started way up beyond 1942, that is we went beyond that, we started with the 1942 return.

Q. Did you determine from the investigation

(Testimony of Clifford M. Rice.)

that he had been engaged in business for some 15 or 20 years before 1936, or possibly 25 years?

A. I heard that.

Q. You didn't investigate that?

A. That was hearsay.

Q. Did you investigate to determine whether or not he had any assets in the way of bank accounts in 1936?

A. I found no bank accounts other than the one personal bank account in all of my investigation.

Q. Prior to 1942 what banks did you examine?

A. The First National Bank of Wallace for personal bank accounts.

Q. Did you have knowledge that he had been a resident of Spokane?

A. Not a resident, no. [268]

Q. Did you make any examination as to any assets in any Spokane bank? A. No.

Q. Did you make any investigation as to any assets in any Sandpoint bank?

A. There was an account of the North Idaho Sales in Sandpoint.

Q. You confined your investigation to these books and records identified in Court?

A. Not entirely, no, sir.

Q. And I believe you said investigation of the County records in 1942?

A. And forward to the end of 1947.

Q. Did you ascertain in this investigation that he had, during this period from 1936 to 1942 and

(Testimony of Clifford M. Rice.)

up to 1944 owned various pieces of property in this county, in Shoshone County and other counties in Northern Idaho?

A. I wasn't looking for that, I was looking for records of sales of property through 1942 to 1947.

Q. You were looking for sales?

A. Yes, sir.

Q. Did you make any investigation in the brokerage houses to determine whether he had any stock?

A. In the investigation of this matter, Mr. Olsen, I understand made that investigation.

Q. Did you make any? [269]

A. No, why should I duplicate his work?

Q. And you cannot state that he didn't have cash, stocks and bonds and also other valuable convertible property or valuables in the commencement of this period, the beginning of 1936 that you have not taken into consideration in this report?

A. From the investigation it appeared that he did not have any valuables at that time.

Q. Did you make any investigation as to these items, bonds, stocks and so on?

A. In questioning Mr. McFee, yes, sir.

Q. In asking Mr. McFee, that was the only investigation that you made as to properties of that kind prior to that period, is that true?

A. As to properties prior to that time.

Q. Yes, as to stocks, bonds, cash and other similar property which would be ready for conversion into cash.

A. I found no record of any sales during the

(Testimony of Clifford M. Rice.)

period that we were interested in, it didn't make any difference whether he had back there, in that time, and still had it, all that we were interested in was what he made in those years.

The Court: You have inquired about stocks and bonds, what bonds and stocks are you inquiring about, if there are any certain house or houses why can't you ask about that and get an answer from the witness.

Mr. Imigh: I think he has testified that he made no [270] such investigation, that he made no investigation at all of any brokerage house.

Q. That is right is it not Mr. Rice, you made no investigation of any brokerage houses?

A. That is right.

Q. You know that it is the practice in business to hold stocks where the certificates have been endorsed and delivered which would frequently not be recorded in the owners name, in the right ownership and later be sold?

A. Yes, I think that is right.

Q. Did you, in making up this net worth statement give credit for merchandise that had been purchased? A. During what period?

Q. During the period that you have testified about.

A. If he had it on hand it would be an asset, yes.

Q. Did you ever take an inventory of what he had on hand at the end of the period?

A. What period?

(Testimony of Clifford M. Rice.)

Q. The period that you have testified to, or any other period?

A. No, I wasn't there at that time.

Q. Well, let me ask, did you give him credit as an asset for any depletion or depreciation on his income tax during the period that you have examined?

A. Yes, those items are taken into consideration in his net income.

Q. Did you give him credit for depletion or depreciation in determining the net income? [271]

A. I don't understand where depletion comes in here.

Q. Where depletion appeared on the books did you give him credit for this depletion in determining the net worth?

A. Nothing other than what is on the return.

Q. The period from 1936 to 1942, you did not have all of his gross income? A. No, sir.

Q. It was just the net income?

A. That is right.

Q. And you did not know what items were taken out for depletion or what items were taken out for depreciation? A. That is right.

Q. You were estimating from the amount of taxes paid, what his income was from 1936 to 1942?

A. No, I am not.

Q. You cannot tell his gross income?

A. No.

Q. Then you are estimating his gross income from the taxes paid on it?

(Testimony of Clifford M. Rice.)

A. No, I didn't estimate the gross income at all, I dealt entirely with the net income.

Q. How did you determine the net income without having the gross?

A. From the amounts testified to by the Internal Revenue Agents in this court.

Q. You are taking the evidence of the other agents? [272]

A. This computation is built on evidence and other exhibits.

Q. You made this computation from other evidence?

A. Not entirely, the Revenue Agents testified from evidence that they had at the time of the examination, at the time that they examined these matters and that was in 1938, 1939, 1940, 1941, '42, '43 and '44,—Mr. Rodger McIntyre testified from this evidence.

Q. Did you give any credit for any sums,—any capital in the North Idaho Sales Company after the original $2,000.00 that was put in there in 1936?

A. No, sir.

Q. Did you know that there was no more money put in as capital from that time on?

A. I don't know.

Q. Then how can you determine the net worth when you have no basis to begin with?

A. From the information that I had available and from this computation.

Q. In that computation you didn't take into account any capital put in that concern after 1936?

(Testimony of Clifford M. Rice.)

A. That is right, if there was any.

Q. I think you stated that you didn't know of any physical assets that he had prior to 1936?

A. That is right.

Q. Do you know that he had no physical assets?

A. Not definitely. [273]

Q. You don't know what he might have had that are not reflected on these books, and do not have to be on there? A. That is right.

The Court: I think we will take a short recess at this time.

April 28, 1952, 3:30 o'clock p.m.

Q. Mr. Rice, your investigation in 1944,—no, I meant to say in 1942, you stated that you started your investigation and that investigation was in relation to the partnership in which Mr. McFee was a partner?

A. You mean my investigation of the year 1942?

Q. Yes.

A. Yes, that is right, and of course of his individual liability.

Q. You didn't have any individual books; the books were all partnership books?

A. Yes, sir.

Q. And the reports were partnership reports?

A. Well, he filed individual returns, those reported one-half of the partnership income.

Q. But it reflects the partnership income, or the business income. A. Yes. [274]

Q. And you have stated that you did give credit for assets on hand at the end of the year?

(Testimony of Clifford M. Rice.)

A. Which year?

Q. Well, for each year.

A. Indirectly all the way through that investigation, yes.

Q. You worked it out on a sheet of paper?

A. This computation shows the assets at the end of the year.

Q. Your computation shows just what amount was bought. You took no inventory, is that true?

A. The investment at the end of the period; his investment in the North Idaho Sales Company.

Q. And no other?

A. It is at the end of 1944.

Q. How about 1942?

A. His investment in the North Idaho Sales at that time, the partnership investment of $65,995.08, that is the figure that I used in the computation.

Q. At the end of 1943, what was the nature of the assets that you reported here for the jury,—in 1943? A. The end of 1943?

Q. Yes.

A. Investment in the North Idaho Sales Company.

Q. None other? A. That is right.

Q. You didn't give credit for the $114,000.00 merchandise not reflected in the books of the North Idaho Sales Company that [275] were purchased in the year 1943?

A. I understood that was sold.

Q. During what year? A. 1943.

Q. You just understood that? A. Yes, sir.

(Testimony of Clifford M. Rice.)

Q. You didn't give him credit for that merchandise I take it, at the end of 1943?

A. In talking to Mr. McFee in Mr. Emasio's office relative to these items he said that would probably be accounted for on the Foresters Club books; they related to the purchase of whiskey and liquor. There was 5 to 7 loads that we had evidence of, coming from the east, in talking to him he explained that was turnover.

Mr. Emigh: I think that is not responsive to the question.

The Court: I think it is, it may stand.

A. ——therefore, why should I give him credit for 113 or $114,000.00 when it was turnover. He purchased one load and then he sells that and purchases another load and takes that and tells it.

Q. Wasn't that item of $114,000.00 a single item?

A. No, it was evidenced by purchases.

Q. In 1943?

A. That is right, some of it cash, most of it, in fact all of it. It was paid in the East, St. Paul and Duluth. [276]

Q. What did you have at the end of 1942?

A. Investment in the North Idaho Sales Company.

Q. Were the assets of the North Idaho Sales Company augmented by $114,000.00 in 1943?

A. Not by my computation, I followed the books.

Q. They did not show this item?

A. For liquor sales, $114,000.00 for liquor sales.

Q. As expended? A. No.

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(Testimony of Clifford M. Rice.)

Q. $114,000.00 didn't show on the North Idaho Sales account as expended?

A. That is right, it was paid in cash.

Q. Paid in cash? A. That is right.

Mr. Emigh: I will ask that this document be handed to the witness.

Q. I will ask you if you recognize that signature, it is Exhibit No. 53.

A. I don't recall that I ever saw this.

Q. Do you recognize that signature?

A. P. H. Sherwood.

Q. You know who he is? A. Yes, sir.

Q. You were in the department in 1944?

A. Yes, sir.

Q. And you knew who he was then? [277]

A. That is right, this is right out of the office of the Commissioner of Internal Revenue, Washington, D. C., and it is signed P. H. Sherwood, head of the division.

Q. And it has the appearance of being genuine?

A. Oh, yes.

Mr. Emigh: We would like to offer this in evidence at this time.

Mr. Patten: No objection.

The Court: It may be admitted.

Mr. Emigh: I would like to read this to the jury.

The Court: You may do so.

Mr. Emigh: This is on the letterhead of the Treasury Department, Office of the Commissioner of Internal Revenue, Washington. "Certificate of

(Testimony of Clifford M. Rice.)

overpayment number 1830042 allowed $25,879.94 schedule number 107607." Addressed to

"A. F. McFee,
303 Sixth Street,
Wallace, Idaho.

Dear Mr. McFee:

The mathematical computation of tax shown on your 1944 return which has been verified and corrected if necessary, indicates that the tax paid for that year was in excess of the amount due. You indicated on your return that you desired to have the overpayment applied on your 1945 estimated tax. Your return has not been completely audited, but if the final develops that an adjustment is necessary you will be advised. Income tax withheld, none; estimated [278] tax paid for 1944, $33,685.64; total $33,685.64. Tax liability shown on return $7,805.70; over payment $25,879.94.

The amount of the overpayment will be credited or refunded as indicated below. You will be relieved from the payment of any amount abated; if an over payment has been made and other taxes are due, credit will be made accordingly and any amount refundable is covered by a Treasury Check transmitted herewith. Included in the accompanying check is interest in the amount stated below allowed on the refund.

By direction of the Deputy Commissioner.

Respectfully,

P. H. Sherwood, Head of Division."

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(Testimony of Clifford M. Rice.)

You may take the witness.

Redirect Examination

Q. (By Mr. Patten): You testified that on July 18, 1948, you had a conversation with Mr. McFee in the Samuals Hotel? A. Yes, sir.

Q. Did you have a list of properties and securities at that time? A. I did have.

Q. Did you go over that list with Mr. McFee? [279]

A. Mr. Olsen went over a similar list that he had and I checked off the items that I had on my list.

Q. Did you ask Mr. McFee if you had overlooked anything? A. Yes, sir.

Q. And what did he say?

A. The only items sold were items on the return, one item was $2,550.00 two sales of stock.

Q. Did he mention any bank accounts or assets or property sold? A. No, sir.

Q. That you did not have on your list?

A. No, sir.

Mr. Patten: That is all.

Recross Examination

Q. (By Mr. Emigh): Whether a fund was a revolving fund or not, it would still be an asset?

A. At the end of the period, yes.

Q. That is what I mean.

A. An asset to that extent.

Q. All of the merchandise would be an asset

(Testimony of Clifford M. Rice.)

as to whatever value it had at the end of the period?

A. Yes, not for the entire funds that went through there.

Q. But all of the merchandise would be an asset?

A. Not if the merchandise was sold during the period. [280]

Mr. Emigh: That is all.

Redirect Examination

Q. (By Mr. Patten): In regard to the liquor purchases and in reference to the conversation in Mr. Emasio's office did you ask Mr. McFee where the funds came from to buy the liquor?

A. Yes, sir.

Q. Where did he say they came from?

A. He said they would be accounted for on the Foresters Club's books.

Q. Such liquor as was left there at the end of the year, would that be shown on the Foresters Club's records?

A. They were and the funds were charged to the purchases on the Foresters Club.

Q. Did he tell you that they were charged to purchases?

A. He didn't say and I don't know that he knew.

Q. Did you determine whether they were charged to purchases?

A. I could not find any drawings from the Foresters Club's books from which he could have gotten the money other than what was charged to purchases. There were inventories on the books of the

(Testimony of Clifford M. Rice.)

Foresters Club for large quantities of liquor.

Q. And such liquor was not at the Foresters Club at the end of any year, would that show on their books? [281] A. Yes, sir.

Q. How would it show?

A. As an inventory on hand at the end of the year.

Mr. Patten: That is all.

Recross Examination

Q. (By Mr. Emigh): If the liquor was distributed to the Foresters Club it would show on its inventory?

A. If it was on hand at the end of the year.

Q. And if it wasn't then it would not show.

A. If you will excuse me a minute, I think I have the inventory at the end of 1943 at the Foresters Club.

Mr. Emigh: I think that is all.

Mr. Patten: That is all, the witness may be excused. Your Honor, the Government at this time rests.

The Court: Ladies and Gentlemen of the jury you will be excused for a few minutes, the Bailiff will call you later.

(In the absence of the jury.)

The Court: I thought you may want to make a motion Mr. Emigh.

Mr. Emigh: Your Honor has been handed a motion for judgment of acquittal, that motion is addressed to the proposition that the plaintiff has

wholly failed to prove and establish beyond a reasonable doubt all of the material facts, and [282] allegations alleged in count one of said indictment.

That the nature of the evidence adduced on behalf of the plaintiff is in its entirety circumstantial and that the circumstances as a whole are not of such a nature as to exclude reasonable hypothesis other than that of guilt.

(Argument of counsel and Court reported but not transcribed.)

The Court: The motion at this time will be denied. You may recall the jury.

(In the presence of the jury.)

The Court: Ladies and Gentlemen of the jury, I am going to excuse you at this time until 10:00 o'clock tomorrow morning. You will meet here at that time.

April 29, 1952, 10:00 o'clock a.m.

(Opening statement by Mr. Emigh.)

EDWARD BERGLAND

Called as a witness by the defendant, after being first duly sworn, testifies as follows: [283]

Direct Examination

Mr. Emigh: With permission of counsel, if agreeable with the Court we will call this witness out of order.

The Court: You may do so.

Q. You may state your name.

A. Edward Bergland.

Q. Where do you reside?

(Testimony of Edward Bergland.)

A. Coeur d'Alene.

Q. What is your occupation?

A. Mechanic.

Q. How long have you lived in this community?

A. I was born in Idaho, I have lived here about nine years.

Q. Where did you live prior to that?

A. Deary, Idaho.

Q. During the years 1945 and 1946 where were you employed? A. In Lewiston.

Q. By whom were you employed?

A. By Mr. McFee in 1945 and a portion of 1944.

Q. About, up to September 1945 were you employed by Mr. McFee? A. By Mr. McFee.

Q. In connection with the North Idaho Sales Company? A. That is right.

Q. In what capacity were you employed?

A. I had charge of machines; slots and phonographs.

Q. Were you to repair and service the machines?

A. I serviced the machines and I was collector, in charge of the amusement machines. [284]

Q. And you are following the same occupation in Butte,—I mean in Coeur d'Alene?

A. Yes, sir, but——

Q. But not employed by Mr. McFee?

A. That is right.

Q. Who do you service machines for?

A. The Roundtable, the D. O. F. and I have serviced the Elks.

(Testimony of Edward Bergland.)

Q. Do you service others as you are called upon?

A. Yes, sir.

Q. I think you said you acted as collector for the North Idaho Sales Company?

A. Yes.

Q. And that was from the first of January, 1945, up to the first of September, 1945?

A. That is right.

Q. In making your collections will you explain the procedure that was followed?

A. The gross was accounted for, the pay-off taken off and the balance divided between the location and McFee.

Q. Where did you put this gross and so forth?

A. Right here (indicating) where it called for it.

Q. And that would show the amount taken from the till, the gross amount? A. That is right.

Q. That was on a book similar to Exhibit No. 39?

A. The same thing. [285]

Q. Who had the key for that machine?

A. I had the keys for all of the machines.

Q. Would the proprietor of the place where the machines were be present when you opened the machine?

A. In one or two spots we insisted on it, in all the places they were present, yes.

Q. And was the money counted in his presence?

A. He was there where he could see it always.

Q. And that is true with all of the locations?

A. Yes.

Q. Would he sign a receipt? A. Yes, sir.

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(Testimony of Edward Bergland.)

Q. One was retained in the book?

A. Yes, sir.

Q. And the one that he received was his record?

A. Yes, sir.

Q. What was done with the book?

A. It was brought to the office and given to the girl.

Q. And the book would have two sheets which would show the same record that the proprietor of the location had? A. Yes, sir.

Q. What did you do with the money that you received?

A. Rechecked at the office and checked in.

Q. What was that?

A. The girl at the office would recheck the money. We had an office girl. [286]

Q. In Lewiston? A. Yes, sir.

Q. Is that the last that you had to do with the money?

A. The statement was brought back from the bank where the deposit was made.

Q. Who would make the deposit?

A. The bookkeeper.

Q. The bookkeeper of the North Idaho Sales Company? A. Yes, sir.

Q. You would not have the money counted after you turned it in with the slip? A. Yes, sir.

Q. In connection with that, the money, whatever the commission was that came to the North Idaho Sales Company or to Mr. McFee and the money

(Testimony of Edward Bergland.)

that was turned over to the proprietor comprised the money from the cash box?

A. That is right.

Q. Now, in connection with that did you ever pay any money directly to McFee which you had taken out of the cash box before it was taken to the bookkeeper of the North Idaho Sales Company?

A. No, sir.

Q. And the amount she checked against the book was the correct amount that was taken out of the machines?

A. Yes, sir, it was double checked.

Mr. Emigh: You may cross examine. [287]

Cross Examination

Q. (By Mr. Patten): You were employed by McFee in Lewiston during 1945? A. Yes, sir.

Q. How many machines did Mr. McFee have in Lewiston?

A. I couldn't say but it was between 65 and 70, about two-thirds of them phonographs.

Q. 65 or 70 machines? A. Yes, sir.

Q. Did he have slot machines in the area surrounding Lewiston?

A. Not outside that I took care of, I had phonographs out of town, I had amusement machines at Kendrick but didn't have slot machines outside of Lewiston at that time.

Q. Did you, during the period that you were employed,—did you always make collections?

A. Yes, sir.

(Testimony of Edward Bergland.)

Q. Anyone else?

A. I had a helper, a girl that helped me but I made the collections.

Q. You said that you had a key to the slot machines? A. Yes, sir.

Q. Did anyone else have keys?

A. No, sir, there were no master keys, I had a key for each machine, I had to drill them once or twice, one or two where I lost the key, nobody else had a key.

Q. Do you know of any arrangement whereby the proprietor turned [288] in only forty per cent?

A. No, sir, it was split 50-50. There may have been a phonograph or two that didn't take in enough, I am not sure whether there was a minimum on that or not.

Q. Do you know how many slot machines that Mr. McFee had in 1945?

A. No, I haven't any idea.

Q. Do you know where all of those slot machines were?

A. No, I don't; I worked only at Lewiston,—I guess I worked here a couple of weeks.

Mr. Patten: That is all.

Mr. Emigh: That is all.

ALICE WHITAKER

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): Mrs. Whitaker, where do reside? A. In Clarkston, Washington.

Q. Where is that in relation to Lewiston?

A. Across the bridge.

Q. It is a suburb of Lewiston?

A. Yes. [289]

Q. How long have you lived there?

A. About 12 years, this last time.

Q. In 1945 and 1946 what was your occupation?

A. I was managing the Foresters Club.

Q. That was in what town? A. Lewiston.

Q. I understand there was another Foresters Club not in Lewiston? A. Yes, sir.

Q. But you were the manager at Lewiston?

A. Yes, sir.

Q. You became manager shortly prior to 1945?

A. Yes, sir.

Q. And you continued as such manager throughout 1945 and 1946? A. Yes, sir.

Q. Prior to being manager, were you employed at that place before that time?

A. Yes, I tended bar and waited tables.

Q. In connection with acting as manager, after you became the manager what were your duties?

A. I had to see that the supplies were in; that they had enough stock, that the help was hired and everything in general.

(Testimony of Alice Whitaker.)

Q. Did you have anything to do with the money that was taken in? A. Yes, sir. [290]

Q. What did you do with that?

A. I counted the money, I checked it and I banked it.

Q. When sales were made was the money recorded in a cash register? A. Yes, sir.

Q. What did you have to do in connection with the cash register?

A. I rang up the sales.

Q. When you made a sale? A. Yes.

Q. When you didn't make the sale, the bartender or whoever it was would ring up the sales?

A. That is right.

Q. Did the cash register have a tape on it?

A. Yes, sir.

Q. At the end of the day what would you do in connection with the money?

A. I would take the tape reading and check the money.

Q. You would verify the money with the tape reading? A. Yes, sir.

Q. What did you do with the money then?

A. I put it in the safe.

Q. Where was the safe? A. In the club.

Q. And you would keep it there until when?

A. Twice a week I banked. [291]

Q. Did you make the deposits yourself?

A. Yes, sir.

Q. Did you keep a record of the cash register receipts?

(Testimony of Alice Whitaker.)

A. Yes, I had a daily sheet that I made out.

Q. Did you keep the deposit slips?

A. Yes, sir.

Q. What did you do with the cash register,—with the recording from the cash register tape and the deposit slip?

A. Each day I would make out a daily report and put the cash register tape on it. I banked twice a week and put the deposit slip with these daily reports.

Q. To whom would you deliver them?

A. To Coeur d'Alene, to the North Idaho Sales Company.

Q. You sent them to Coeur d'Alene?

A. Yes, once a week.

Q. You may state whether or not during the time you were there, Mr. McFee kept money which was not the Foresters Club's money in that safe?

A. He had a personal file.

Q. In the form of some kind of folder?

A. Yes, it was.

Q. Do you have any recollection of any transaction with Mr. Sonduck in relation to the money kept there by Mr. McFee? A. Yes, sir.

Q. Just what was that, generally?

A. Mr. McFee called me and told me to give him some money. [292]

Q. Do you remember the amount?

A. Yes, $1,000.00.

Q. Did you have that?

A. Yes, I took it out of his personal file.

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(Testimony of Alice Whitaker.)

Q. Did you place anything in the file to show that the money was taken? A. Yes, sir.

Q. What was that? A. I put this slip in.

Q. You put in a slip? A. Yes, sir.

Q. That was the transaction you remember in connection with that business? A. Yes, sir.

Q. On each occasion and date, all of the time, were the receipts from the Foresters Club accounted for by you in the manner that you have described?

A. Yes, sir.

Q. Did you, in connection with that business, maintain a petty cash fund? A. Yes, sir.

Q. For the operation of the business there from day to day? A. Yes, sir.

Q. How much was that?

A. I cannot say truthfully, it was quite a while ago.

Q. Was it a large amount? [293]

A. I cannot say definitely, but I don't think that it was too large.

Q. In connection with the collection of the slot machine receipts would you be present when these were accounted for? A. Yes, sir, I was.

Q. And is the procedure described by the preceding witness,—Is that the way it was generally done, was that the procedure that you followed?

A. Yes, sir.

Mr. Emigh: That is all, you may examine.

Cross Examination

Q. (By Mr. Patten): You stated that Mr. Mc-

(Testimony of Alice Whitaker.)

Fee had a personal file in the safe? A. Yes.

Q. Did he have it there on January 1, 1945?

A. Yes, sir.

Q. How much money did he have in that file?

A. It varied in amounts.

Q. Was it a big amount or a little amount?

A. I cannot say, it has been quite a few years ago.

Q. You looked in there? A. Yes, sir.

Q. Will you indicate with your hand, how—withdraw that please—What type of bills were in there? [294]

A. Well, it was a regular file with slots in it.

Q. Would it have $5,000.00, $10,000.00 or $15,000.00? A. It was his personal file.

Q. But you got money for Mr. Sonduck out of it? A. Yes, he told me to.

Q. How much was in there at that time?

A. I honestly don't remember.

Q. How much was there on December 31, 1946?

A. I cannot say.

Q. Was there lot of money or a little bit?

A. I cannot say.

Q. Was it more than there was there in 1945 or less? A. I don't remember.

Q. You stated that you went into the folder and gave the money to Mr. Sonduck? A. Yes, sir.

Q. Did you take any money out for anyone else? A. Well, I remember that time.

Q. In 1945 or 1946?

A. I remember that instance, Mr. McFee called

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(Testimony of Alice Whitaker.)

me. I don't remember any other instance.

Q. Well, the money came in and went out, how do you recall that particular instance?

A. Yes, I recall that particular instance.

Q. And will make the statement under oath to this court that you didn't take any other money out of there? [295]

A. I don't remember any other though I do remember that instance.

Q. Why do you remember that instance?

A. I don't know.

Q. Did you discuss the Sonduck instance with counsel before you took the stand?

A. Maybe because it was a $1,000.00 and it seemed like a lot of money to me.

Q. Did you discuss the Sonduck incident with counsel? A. Yes.

Q. You discussed this $1,000.00 for Mr. Sonduck with counsel, did you? A. Yes, sir.

Mr. Patten: I think that is all.

Redirect Examination

Q. (By Mr. Emigh): What was your maiden name?

A. At the time I was working at the club my name was Hancock.

Q. What was your maiden name?

A. Evans.

Q. You had nothing to do with putting money in there, in that file, or keeping any account of the money that McFee had? A. That is right.

(Testimony of Alice Whitaker.)

Q. If you took money out of that file at other times under Mr. McFee's instructions is it a fact that you followed the [296] same procedure that you did when you took the money out for Mr. Sonduck? A. Yes, sir.

Mr. Patten: We object to that as a conclusion of the witness.

The Court: The answer may stand.

Q. Your answer was yes?

The Court: You are assuming that she didn't remember anything she has answered but if you think it is important I will consider this matter, I don't think that it is. I think I will let the answer stand.

Q. Do you know how the money got to Mr. McFee's personal file?

A. No, sir, I had nothing to do with that.

Q. Was it money that appeared to be put in by the Foresters Club?

A. It was his personal file.

Q. You put no money in there out of the Foresters Club? A. I did not.

Mr. Emigh: That is all.

Recross Examination

Q. (By Mr. Patten): How many slot machines did you have in the Foresters Club in 1945 and 1946? A. Six I believe it was. [297]

Q. And what was the denomination of those?

A. There were two quarter machines, two dimes, one half and two nickels.

Mr. Patten: That is all.

Mr. Emigh: That it all.

R. E. McDONNELL

Called as a witness by the defendant, having been heretofore duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): You previously appeared as a witness? A. Yes.

Q. In the year 1943, and up to 1945 you may state whether or not you had a wholesale liquor stamp. A. Yes, sir, I did.

Q. There was some testimony yesterday by Mr. Rice of an investigation of Mr. McFee's business, and there was reference to $114,000.00 in liquor, are you familiar with that transaction?

A. Yes, sir.

Q. Of that money, did Mr. McFee advance you any of it? A. Yes, sir.

Q. How much? [298]

A. The figure of $114,000.00 less $3,800.00 and $7,500.00.

Q. That would be around $101,000.00 that he advanced on that? A. Yes, sir.

Mr. Patten: Was it $7,500.00 you said?

A. Yes.

Mr. Patten: You are talking about the $114,000.00 item, I can't get at your figures.

Q. How much came out of that $114,000.00?

A. Two items, $7,500.00 that was my money, and $3,800.00 belong to another fellow.

(Testimony of R. E. McDonnell.)

Q. That would be $11,300.00 which was not McFee's money? A. Yes.

Q. The remainder was McFee's money?

A. Yes, sir.

Q. You may state whether or not this money was returned to McFee in whiskey or cash.

A. Yes, sir, it was.

Q. You may state whether or not this entire amount so advanced or any money was returned to McFee in whiskey or cash?

A. That is right, yes, it was,—that is correct.

Mr. Emigh: You may cross examine. [299]

Cross Examination

Q. (By Mr. Patten): Mr. McDonnell, were you subpoenaed by the defense?

A. I was asked to testify by the defense.

Q. Did you receive a subpoena from the defense?

A. I was subpoenaed by the Government and then released.

Q. How long have you known Mr. McFee?

A. Since 1921 or 1922.

Q. Has that association been very cordial and intimate? A. Yes, it has been.

Q. What are you doing now, Mr. McDonnell?

A. Running a tavern.

Q. Where? A. At Wallace, Idaho.

Q. Where in Wallace is your tavern?

A. At the Samuals Hotel.

Q. Who owns the Samuals Hotel?

(Testimony of R. E. McDonnell.)

A. To my knowledge, Mr. McFee.

Q. You stated that Mr. McFee loaned you about $111,000.00?

A. No, I didn't say that; he advanced it to me for this liquor.

Q. Was there any record made of that transaction? A. Yes, I think so.

Q. And was that reported on your income tax return?

A. No, it wasn't my transaction.

Q. You had no interest in this business?

A. Yes, I had $7,500.00.

Q. How do you know that Mr. McFee advanced $114,000.00?

A. He gave me the money and I bought whiskey with it. [300]

Q. From whom did you buy this liquor?

A. From Herman Pastor and Sam Teran.

Q. When was the first time you purchased liquor and from whom?

A. The exact date I am not positive of but I think it was in July.

Q. July of what year? A. 1943.

Q. In July of 1943? A. Yes, sir.

Q. From whom did you buy this liquor?

A. From Pastor and Teran.

Q. What kind of liquor did you get?

A. Various brands,—various kinds.

Q. How much did you spend at that time?

A. There was around $114,000.00 put up for whiskey.

(Testimony of R. E. McDonnell.)

Q. At this time in July that was put up for whiskey? A. About that time, yes, sir.

Q. We are talking now, Mr. McDonnell, about the first load of liquor in July, 1943.

A. In July, 1943, I went to St. Paul with most of this money and gave it to those two fellows.

Q. How much of this money did you have?

A. I couldn't say to the penny but it was around $70,000.00 or better.

Q. You went with $70,000.00 to St. Paul?

A. Yes. [301]

Q. And you bought all of this liquor?

A. Yes, sir.

Q. Did you pay the money personally to Sam Teran and Tony Pastor? A. Yes, sir.

Q. Where was this? A. In St. Paul.

Q. Where in St. Paul?

A. At the Mayflower Novelty Company on University Avenue.

Q. Do you recognize the signature on the bottom of that document (indicating)?

A. Well, I am not positive of it.

Q. Whose does it look like?

A. A. F. McFee's.

Mr. Patten: May I read the statement to the jury?

Mr. Emigh: We object to this, we think at least it should be put in evidence before it is read.

Mr. Patten: I offer it in evidence as Exhibit No. 54, and I will ask another question.

Q. You have known Mr. McFee for a number

(Testimony of R. E. McDonnell.)

of years? A. Yes, sir.

Q. And are you familiar with his signature?

A. I have seen it quite a bit.

The Court: Now, do you have any objections?

Mr. Emigh: We object to it as incompetent, irrelevant and immaterial and not identified as to have any connection [302] with this case. It is a violation of the Constitutional rights of the defendant to admit this.

The Court: It may be admitted.

Mr. Patten: Now, may I read it to the jury?

The Court: Yes, you may.

Mr. Patten: "I, A. F. McFee, manager of the North Idaho Sales Company, Wallace, Idaho, make the following voluntary statement to Stephen B. Derringer and W. F. Morrison, known to me as Investigators for the Office of Price Administration and Agency of the United States Government. That Saturday, August 6, 1943, I received from a firm known as Minnesota Canning Company, 475 cases of whiskey, being 425 cases of Tom Burns a bourbon blend and 50 cases of Sloe Gin. Shipped by the foregoing company via Oskey Brothers Truckline of St. Paul, Minnesota. That for this shipment I paid $25,300.00 cash to an unknown fellow in Duluth, Minnesota. All I know about the fellow who sold the liquor is he was Jewish. That under oath I swear the entire contents of this shipment was whiskey and not canned peas a rationed commodity as the shipment was described on the bill of lading. That I am the sole owner

(Testimony of R. E. McDonnell.)

of the North Idaho Sales Company and we have not sold, nor have we purchased any groceries or food rationed by the United States Government, and we have no intention to traffic in any rationed foods." That is signed by A. F. McFee and it is dated at Wallace, Idaho the 11th of August, 1943, and it is witnessed by Stephen B. Derringer. [303]

Q. Now, Mr. McDonnell, you stated that in July of 1943 you purchased $70,000.00 worth of whiskey, would you care to change that statement?

A. I didn't say $70,000.00 worth, I can clear up this whiskey deal, it was,—I said that it was used to purchase,—we made a trip to Duluth with this fellow Pastor and he purchased the whiskey there.

Q. You said that you were handling it.

A. I did, but Pastor was delivering it to us, he was the one that delivered it.

Q. Did you purchase this whiskey all at one time?

A. The money was deposited there and as the whiskey was found it was shipped up here.

Q. When did you receive the first of whiskey?

A. I forget whether it was in August or October.

Q. Did you receive all of the whiskey at one time?

A. No, sir, this 475 cases was received at one time.

Q. Isn't it a fact that you received whiskey at regular intervals all during the year 1943?

(Testimony of R. E. McDonnell.)

A. Not regular, but at different times.

Q. Isn't it a fact that as you sold one lot you bought another?

A. I would not say that; I would sometimes we would receive two lots before one was sold; another thing was that pretty regularly loads of whiskey was demanded or needed in these clubs. I had to have whiskey in my place and as I ran short or as McFee ran short we would need more. [304]

Q. Did you keep any record of the whiskey that you received and the money you paid, when you paid and to whom you paid it?

A. I believe it was, I didn't.

Q. Have you seen such a record?

A. Years ago.

Q. Do you have it now?

A. No, I don't,—he sold more than I did.

Q. Start in with June of 1943 and tell us about the whiskey that you got?

A. I don't think that we got any at that time

Q. Did you purchase any?

A. If I recall right, it was in July.

Q. In July?

A. Yes, but I could be wrong.

Q. How much did you purchase then?

A. We deposited about $70,000.00 with this May flower Novelty Company.

Q. Did you take this $70,000.00 then to the May flower Novelty Company? A. Yes, sir.

Q. In currency? A. Yes, sir.

Q. And you gave them these funds in July?

(Testimony of R. E. McDonnell.)

A. I can't remember the exact date, it is not clear in my mind.

Q. Why didn't you get all of the whiskey at that time? [305]

A. It wasn't available, you had to have a way of getting it out.

Q. Would it refresh your memory for me to mention Yiddy Bloom and Little in Duluth, Minnesota?

A. I remember a fellow,—meeting a fellow by the name of Little.

Q. Did he have anything to do with this transaction? A. Not that I remember.

Q. If you had paid Teran and Pastor the $70,000.00 then will you explain this $25,300.00 payment made a little later?

A. Of course there was more money than this $70,000.00,—the $70,000.00 was given to Pastor, it was put in there the following day I believe, we arrived in St. Paul and it was the following day I think, I don't remember the date.

Q. You said that Mr. Pastor was the man who gave the money to this other man, the man mentioned in this affidavit.

A. I think I am right in that.

Q. Do you know about funds that were transferred at the Davenport Hotel in Spokane, in September of 1943? A. Yes, sir.

Q. Will you tell the jury about this?

Mr. Emigh: We object to that it is not proper

(Testimony of R. E. McDonnell.)

cross examination and it is not shown to be related to this transaction.

The Court: He may answer, this matter of the purchase of liquor was brought about by your examination.

A. Mr. Pastor came out to Idaho to pick up some more money.

Q. If he had $70,000.00 on deposit why did he need more money? [306]

Mr. Emigh: That is objected to as being argumentative.

The Court: He may answer.

A. He was out here doing other business with other people and at that time he picked up this money.

Q. Does it refresh your memory to say that in October of 1943 there was a certain amount expressed,—may I ask first how much Mr. Pastor was given in the Davenport Hotel in Spokane?

A. I don't remember.

Q. You were in that transaction?

A. I don't remember.

Q. Does the figure $27,000.00 refresh your memory?

A. It may have been only that, but that figure doesn't click.

Q. You were handling these funds that you got from Mr. McFee? A. Yes.

Q. But you don't remember the amount that you gave the gentleman in the hotel?

A. No, I don't.

(Testimony of R. E. McDonnell.)

The Court: I will excuse the jury at this time, but we will not recess for a moment.

(In the absence of the Jury.)

The Court: I just want to caution you Mr. McDonnell, and I want the record to show that this is in the absence of the jury but the reporter is here, I want to tell you that of course the reporter is taking down your testimony and so far in your testimony it is quite questionable in the Court's mind whether you have been hewing to the line or not. It is the [307] practice of this Court in cases where it is questionable as to the truth of testimony given, to refer the record and all of the testimony of the witness who might be questioned,— I don't say that you are not telling the truth but as I say, it is my practice where there is a question to refer it to the prosecuting officers for their investigation. It is very important that all witnesses hew to the line and tell the truth. I recognize the matter of friendship and the pressure that may be put on the witness but the charge that may be brought against one for testifying falsely is perhaps more serious than income tax evasion. That is all I have to say. I think we will recess at this time for 15 minutes.

April 29, 1952, 11:10 o'clock a.m.

Q. Is it your testimony that you received from Mr. McFee and gave to Herman Pastor and Sam Teran approximately or practically $70,000.00 or more in July of 1943?

POOR COPY

(Testimony of R. E. McDonnell.)

A. What do you mean by more?

Q. How much did you give Sam Teran and Tony Pastor?

A. At the first time we purchased whiskey?

Q. Yes. A. About $70,000.00.

Q. And you also testified that Mr. Pastor gave a Jewish fellow $23,500.00 of the money that you gave him. [308]

A. I don't remember that.

Q. Well, I remember it distinctly, did he or did he not?

A. I said that who gave the Jewish fellow money?

Q. You heard the statement read that the Jewish gentleman in Duluth, Minnesota, was given $25,-300.00, you told the jury that Mr. Pastor took some of the money you gave him and went over and paid another person.

A. To my best recollection, that is the truth.

Q. You have been handed a document, will you look on both sides and tell me if you know what that is?

A. It looks like a part of Mr. McFee's bank account.

Q. You testified that this transaction took place in August and that the amount this gentleman was given was $25,300.00, did you see that man in August? A. Yes, I did.

Q. What was the date in August?

A. August 6.

Q. 1943? A. Yes.

(Testimony of R. E. McDonnell.)

Q. What is the amount of the check that went through the North Idaho Sales Company bank ac-on that date? A. $21,000.00 and a——

Q. ——Will you read that again?

A. Oh, yes, here, $25,300.00.

Q. Have you ever been convicted of an offense?

A. Yes. [309]

Q. A felony?

A. I am not sure that it was a felony.

Q. What disposition was made of the case?

Mr. Emigh: We object to this as it is not a proper question.

The Court: He may answer.

A. I think it was a felony, it was an O.P.A. charge.

Q. You are certain that it was an O.P.A. charge?

A. We were charged with conspiracy and plead guilty to an O.P.A. charge.

Q. Where was that and when?

A. In St. Paul, in 1944.

Q. Was that the only time you have been convicted of a felony?

Mr. Emigh: That is objected to as incompetent, irrelevant and immaterial; counsel is going beyond the proper limits of examination as to this nature of testimony.

The Court: It has nothing to do with this case, I presume it goes to the credibility of the witness.

A. May I answer, Your Honor?

The Court: Yes.

POOR COPY

(Testimony of R. E. McDonnell.)

A. In Bismarck, North Dakota I plead guilty in 1946.

Q. And that transaction related to this business that we are talking about now?

A. It was over liquor, yes sir.

Q. Isn't it a fact Mr. McDonnell that you purchased one load of liquor in July, 1943 and later you bought another load [310] in August of 1943 and paid for it instead of paying for it all at once?

A. I don't remember the date that was.

Q. Where did the $25,300.00 come from that was paid in Duluth?

A. To the best of my knowledge, as near as I can remember Pastor paid for it.

Q. Why is this charge on the same date in the bank account? A. I don't know.

Q. Isn't it a fact that in September you bought still another load and paid $27,000.00 in the Davenport or perhaps, you don't remember that?

A. I remember the transaction in the Davenport too since the question was mentioned. That doesn't mean that there was another load, that doesn't necessarily mean that.

Q. Isn't it a fact that in October of 1943 you bought another load and sent $20,000.00 by express?

A. I can't answer that yes or no without explaining it.

Q. Whether you did or not, can't you answer that. Did you get a $110,000.00 or more worth of liquor, did you give that at one time, in one sum,

(Testimony of R. E. McDonnell.)

or did you buy liquor throughout the year and pay for it in that way?

A. Different payments, it is not a fact that every time there was a payment made there was load came to Idaho.

Q. You testified that you gave between $70,000.00 and $110,000.00 at once, do you wish to alter that statement? A. Yes, sir, that is correct.

Q. Do you recognize the signature on that?

A. No, I don't.

Q. You never met him?

A. Yes, but I have not seen his signature so far as I know, this is the first time.

Q. Does anything on that document refresh your memory or cause you to see that in a different light?

A. There is nothing there to refresh my memory.

Q. It does not refresh your memory?

A. No, that confuses me.

Q. You still wish to say that you gave Pastor $114,000.00?

Mr. Emigh: I understood he said that he gave him $70,000.00.

Q. How much did you give him?

A. About $70,000.00, it may have been $65,000.00 or $70,200.00.

Mr. Emigh: Did you mean $65,000.00 or $6,500.00? A. $65,000.00.

Q. Does that record differ from your memory?

A. Yes, it does.

Q. Whose signature does it appear to be?

(Testimony of R. E. McDonnell.)

A. Herman Pastor's.

Mr. Emigh: We object to whose it appears to be.

The Court: He may answer.

A. Mr. Pastor's.

Q. What does Pastor say about the transaction?

Mr. Emigh: Now we object to using it, this is bringing [312] or attempting to bring it in by the back door.

The Court: I will sustain the objection; you may question him on matters that you think will change his recollection but as far as the document is concerned it is not admissible at this time.

Q. You do not wish to look at your statement?

A. This doesn't refresh my memory, in fact my memory is pretty clear.

The Court: Just answer the question, whether you wish to look at your statement or not.

A. No, I don't.

Q. You deny that the sum paid to Pastor in July was $42,000.00?

Mr. Emigh: We object to this, the witness is being asked on matters that are not proper cross-examination.

The Court: He may answer.

Mr. Emigh: We object to using this document at this time.

The Court: He is not using it, he asked the witness something else.

Q. You deny that in July of 1943 the sum paid was $42,000.00?

Mr. Emigh: We object to this question as——

(Testimony of R. E. McDonnell.)

The Court: ——The Court has ruled on this matter now let's get along.

A. No, I don't deny that he wasn't paid the $42,000.00.

Q. You stated that he was paid $70,000.00?

A. Yes, sir. [313]

Q. And you deny then that he was paid $42,000.00? A. No, I don't.

Mr. Emigh: We object to that question, it is not a fair inference of what the witness' evidence is.

The Court: He may answer.

A. There was about that amount taken back in cash after we arrived in St. Paul, yes, there was more money given me that I gave Pastor.

Q. You deny that in August of 1943 some person was paid $27,300.00 with funds drawn from the North Idaho Sales Company?

Mr. Emigh: We object to that, he says that he has no knowledge, he hasn't denied it; we object to the form of the question as improper, it is imputing to the witness that he denies matters that he cannot and could not testify about.

The Court: The witness may answer.

Q. Do you deny that a person unknown was paid $25,300.00 in August of 1943 in Duluth, with funds withdrawn from the North Idaho Sales Company? A. No, I don't deny that.

Q. Do you state—you previously stated that the funds came from Tony Pastor?

A. You were talking about a certain load of liquor that to my knowledge came from Pastor. The

(Testimony of R. E. McDonnell.)

money that he received through me. I don't deny that some persons didn't receive that money. [314]

Q. Do you deny that in September 1943 $25,000.00 was paid to Herman Pastor in the Davenport Hotel?

Mr. Emigh: The witness didn't deny that, he didn't fix the amount; we object to this question, it is not fair to the witness.

The Court: He may answer.

A. I don't deny that, I don't deny that any was paid to this man or that he was paid that amount.

Q. Do you deny that in October 1943 $20,000.00 was sent by express to Mr. Pastor?

Mr. Emigh: May I have an objection to that same line of questioning, it is not fair to the witness to base questions on something that he did not deny.

The Court: I think perhaps you better make your objections and this one will be denied and he may answer.

A. No, I don't deny that.

Q. What happened to the last load of liquor that came out of St. Paul?

Mr. Emigh: I think it is an improper question and I object.

The Court: He may answer.

A. I cannot truthfully remember. I think that liquor was distributed in several different places and it would be hard to remember which load went to which place.

Q. You don't remember that load being condemned and being seized? A. No, I don't.

(Testimony of R. E. McDonnell.)

Q. You were in Bismarck?

A. Are you talking about Fargo?

Q. Fargo or Bismarck, this was your liquor?

A. I was handling liquor.

Q. You would not remember if you lost a truck load of liquor?

A. I remember that very well, but it wasn't the last load.

Q. There was a load that had been seized?

A. Yes, sir.

Mr. Patten: I believe that is all.

Redirect Examination

Q. (By Mr. Emigh): Was that recovered?

A. Yes, it was.

Q. Your testimony was, I believe, that you received this advance from Mr. McFee of $114,000.00 less the two items that you gave us?

A. Yes, sir.

Q. Less the two items you gave before any liquor was delivered or money paid back to McFee?

A. That is correct, the other two items were at first.

Q. How long have you been in the Metals Bar?

A. Since 1936.

Q. Were you in the Metals Bar before the building was purchased by Mr. McFee? [316]

A. Yes, sir.

Q. How long before that were you there?

A. I think he has had it about five or six years, I cannot be sure on that.

Mr. Emigh: That is all.

Mr. Patten: That is all.

JEAN DELLYEA

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): Your name is Jean Dellyea? A. Yes sir.

Q. Where do you reside?

A. Right now in a trailer house.

Q. What do you do?

A. I am a waitress.

Q. What did you do in 1945 and 1946?

A. I was the manager of the Foresters Club in Coeur d'Alene, Idaho.

Q. You were employed by that club?

A. Yes sir.

Q. During that entire period? [317]

A. Yes sir.

Q. In connection with your employment at that club, what were your duties?

A. To hire and fire and to take care of the money and make up the daily reports.

Q. In connection with the daily reports, how was the money handled?

A. Every night I would take the total off the cash register, put the money in a sack and put it in a safe.

Q. What did you do by way of making a record?

A. On the cash register, I took the daily report

(Testimony of Jean Dellyea.)

sheet total, the register showed the total of what we took in and that was our report.

Q. The tape on this cash register?

A. Yes, sir.

Q. You would make up a daily report from that?

A. Yes sir.

Q. And what would you do with the money?

A. Put it in the safe.

Q. What would you do after you put it in the safe?

A. Lou Dolan would come up from the North Idaho Sales Company and check the money over and take it.

Q. Out of the paid cash funds did you pay items as cash expenses? A. Yes sir.

Q. And did you keep a record of that? [318]

A. Yes, sir.

Q. And was that turned to the North Idaho Sales Company? A. Yes, sir.

Q. Did you keep a memorandum of slot machine receipts? A. Yes, sir.

Q. The memorandum that you kept, was that retained by the Foresters Club? A. Yes, sir.

Q. Did you ever make the deposits?

A. No, sir, I didn't.

Q. Other than petty cash items, did you keep any money out of the receipts of the Foresters Club? A. No, sir.

Q. How much would be kept out of the paid cash funds?

A. You mean how much we kept to operate on?

(Testimony of Jean Dellyea.)

Q. Yes.

A. About $2,000.00 we kept to operate on.

Q. When collections were made from slot machines would you be present? A. Yes, I was.

Q. And what was done with the money taken out of the cash box on the slot machines?

A. You mean taken out of the slot machines?

Q. Yes.

A. I would take part of it and the North Idaho Sales Company would take part of it. [319]

Q. Was all of the money taken out of the cash boxes? A. Yes, sir.

Q. Was it entered in a book of any kind?

A. Yes, we had a receipt.

Q. And that book was in the possession of anyone particularly? A. What do you mean?

Q. Who brought that book over to you?

A. The North Idaho Sales Company.

Q. The collectors? A. Yes, sir.

Q. Were entries made in the book at the time the money was taken out of the machines?

A. After we counted the money.

Q. Was the gross amount taken out of the cash box and entered in the book? A. Yes, sir.

Q. I understand that there were three sheets in that book, one very thin and two thicker ones?

A. That is right.

Q. The top sheet was given to you?

A. Yes, sir.

Q. Did you sign the book? A. Yes, sir.

Q. Before the receipt was taken out?

(Testimony of Jean Dellyea.)

A. Yes, sir.

Q. Your signature was on this slot machine, receipt, all of [320] your receipts of that kind?

A. Yes, sir.

Q. Your share was placed in the funds of the Foresters Club? A. Yes, sir.

Q. The other half was taken by the North Idaho Sales Company? A. Yes, sir.

Q. At any time, to your knowledge, while you were operating that place was there,—strike that please,—did that book which was signed by you and in the hands of the collector fail to show the correct amount taken out of the machines?

A. No, sir.

Q. And your collections from the Foresters Club were then banked, how often would you say?

A. I cannot tell you because I did not do the banking.

Q. How often did you deliver the cash that you received and the records of the receipts of the cash?

A. Every day.

Q. The cash receipts and the slot machine receipts were delivered to the North Idaho Sales Company? A. Every day.

Q. And were those correct accountings of the money, less the current expenses consisting of moneys retained for the petty cash funds?

A. Yes, sir.

Q. The petty cash fund was maintained at around $2,000.00? A. Yes, sir. [321]

Q. And that was used for the expense of the

(Testimony of Jean Dellyea.)

business? A. Yes, sir.

Mr. Emigh: You may take the witness.

Cross Examination

Q. (By Mr. Rossi): What was your occupation prior to 1945 and 1946? A. Waitress.

Q. How long were you employed as manager of the Foresters Club?

A. In 1945 and part of 1946.

Q. How many months?

A. About four months in 1946.

Q. And all of the year 1945? A. Yes, sir.

Q. Where was the Foresters Club in Coeur d'Alene? A. In the Powell Building.

Q. How many machines did the Foresters Club have?

A. At that time I think we had about six machines.

Q. Can you tell the denominations of the machines?

A. We had half-dollar machine, a couple of quarter machines and we had a dime machine I remember and some nickel machines.

Q. You stated that you didn't deposit the money in the bank for the Foresters Club?

A. That is right.

Q. Who did? [322] A. Lou Dolan.

Q. Who is Lou Dolan?

A. She works for the North Idaho Sales Company.

Q. The person collecting for the North Idaho

(Testimony of Jean Dellyea.)

Sales Company also deposited the money for the Foresters Club? A. Yes, sir, that is right.

Q. Who was the owner of the Foresters Club?

A. Mr. McFee.

Q. Did you know whether Mr. McFee had an interest in the North Idaho Sales Company?

A. Yes, sir, he did.

Q. At the time that you operated the Foresters Club in 1945 what was the general business condition with respect to the Club?

A. In 1945 business wasn't too good, in fact I was there about 2 months practically by myself, with just one floor girl.

Q. What about 1946?

A. Business was better then.

Q. During the time that you operated the club in Coeur d'Alene can you give any estimate as to the monthly income from slot machines?

A. No, sir.

Q. How much weekly income was there from the slot machines? A. No, I cannot tell.

Q. Can you give any estimate as to the daily take?

A. No, because it was different, the business wasn't anything [323] like it was before that time.

Q. In 1946 you say the business was good, can you give an estimate of the daily take, or between what amounts it would vary?

A. No, I can't. Our slot machine play wasn't too good.

(Testimony of Jean Dellyea.)

Q. Can you give an estimate in dollars and cents?

A. From $50.00 to $100.00 a day in 1946, and it wasn't even that good lots of days.

Q. $50.00 to $100.00 a day?

A. That was when business was better, lots of times it wasn't that good.

Q. What was your salary as manager of the Foresters Club? A. It was sixty dollars.

Q. A week? A. Yes.

Q. You had no interest in the business?

A. No, sir, not a bit.

Q. Who hired you?

A. I was hired by Mr. McFee.

Q. Did you manage any club prior to 1945 and 1946? A. No, sir.

Q. Have you ever run one afterwards?

A. I worked in lots.

Q. You were never manager prior to that time?

A. No, I have taken on lots of responsibilities but I cannot say I was the manager of one. [324]

Q. Were you acquainted in any way as to the number of slot machines that Mr. McFee or the North Idaho Sales Company had in Coeur d'Alene?

A. No.

Q. Do you know whether they had any besides the ones in your place of business? A. No.

Q. You were just an employee of Mr. McFee both with respect to the North Idaho Sales Company and the Foresters Club?

A. That is right.

(Testimony of Jean Dellyea.)

Q. Did Mr. McFee keep any money in the Foresters Club other than his drawing account in the bank? A. How do you mean?

Q. Did he have any cash or papers in the safe?

A. He had some cash.

Q. How much cash?

A. I don't know; that is something that I never bothered with.

Q. Were you ever asked to withdraw any cash from his personal papers for any reason at all?

A. No, I wasn't.

Q. You had nothing to do with that at all?

A. No, it wasn't anything to me.

Q. In what form was this money that Mr. McFee had in the safe, was it in a package?

A. It was in a large envelope.

Q. Was it a large or small amount? [325]

A. It was in a folder about the size of an envelope.

Q. Was it sealed? A. Yes, sir.

Q. At any time while you were there were you asked to get any money out of that folder?

A. All I did was put the money in the safe.

Q. Did you ever put money into this folder or envelope? A. No, sir.

Q. At any time that you were manager of the Foresters Club did Mr. McFee come in and pick up any of this money?

A. No, sir, not that I know of.

Q. You didn't know whether there was any money in that envelope or not?

(Testimony of Jean Dellyea.)

A. No, I didn't figure it was any of my business.

Q. It might have been just paper?

A. It might have been.

Mr. Rossi: That is all.

Redirect Examination

Q. (By Mr. Emigh): As to the payment of the employees, how was that handled?

A. They were paid by check.

Q. Out of what office?

A. The North Idaho Sales Company. [326]

Q. You had nothing to do with the handling of the money after you collected it and turned it over to the North Idaho Sales Company?

A. That is all that I had to do with it.

Q. Other than the petty cash.

A. That is right.

Mr. Emigh: That is all.

Mr. Rossi: That is all.

LEONARD SHERMAN

Called as a witness for the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): How old are you?

A. 37.

Q. How long have you lived in this community?

A. For 10 years.

Q. And what has been your employment for the last 15 years?

(Testimony of Leonard Sherman.)

A. Well, the last 12 years for the North Idaho Sales Company.

Q. Before that?

A. Well, there was truck driving and other different things.

Q. During the 12 years that you have been employed by the North Idaho Sales Company what work have you done generally? [327]

A. Well, for a while I was mechanic and serviceman.

Q. Serviceman and mechanic for what?

A. Coin operated devices.

Q. Did that include different kinds of machines?

A. Slot machines, phonograph, and free plays.

Q. During that time have you been manager of the Coeur d'Alene office? A. Yes, sir.

Q. For how long? A. About 10 years.

Q. And in connection with your work as manager, and serviceman have you collected for the concern? A. That is right.

Q. What monies have you collected?

A. Well, I would go to the location; I would take a book out of the main office in Wallace, this is a branch office. I would take it out of the office and go out and collect and bring back the money.

Q. Did you make the collections?

A. Yes, sir.

Q. Did any other persons make collections during the period you were making collections?

A. Very seldom.

(Testimony of Leonard Sherman.)

Q. Will you just describe the procedure to the jury in making those collections?

A. Well, I would take a book, a commission book out of the office—— [328]

Q. ——You refer to a commission or collection book, was it similar to Exhibit No. 39 which is handed to you? A. That is right.

Q. Was that the same form used by that concern since you have been working for it?

A. Yes.

Q. Now proceed to tell the jury how each step was taken in making this collection.

A. I would take this book and go to a location, I would write down the date and the name of the location and take the money out of the machines and set it down and then with the proprietor of the location we counted it. If there was any pay-outs we took that out first and put the amount to divide down. They would go over the commission to see what they were and then they would sign and I would sign; I gave them a carbon copy and the original and tissue were left in the books, I would bring the book in and check it in the office, I would check out with the office girl.

Q. What would you do with the money collected?

A. It would have to correspond with this book.

Q. And did it do that? A. Yes, sir.

Q. Did you turn the money in with the book?

A. Yes, sir.

(Testimony of Leonard Sherman.)

Q. Do you have anything to do with making the deposits or did [329] you?

A. No, not down here, I turned it into the office and she made the deposits.

Q. Did you accompany her on occasions?

A. I might have drove her up there.

Q. The money was then deposited by the girl and not by you? A. That is right.

Q. What did you mean by pay-outs?

A. If we had a short pay I,—if there was a few nickels and dimes in the phonograph I would give it back.

Q. If there was a little money in the machines, you would return it? A. Yes, sir.

Q. And would it show on the slip?

A. No, sir, it would be done before I set the gross down in the books.

Q. There would be no record of that?

A. No.

Q. Would that be of any consequence in amount?

A. No, sir.

Q. What would you say the maximum of that would be at any one time?

A. That would be hard to say, it would depend a lot on what it was, where the location was.

Q. It would depend on the phonograph?

Mr. Rossi: I would like to have the witness testify [330] and not the counsel.

Q. I am referring now to what the amount was?

A. I cannot say exactly as to the pay-outs, but I know it wasn't very much.

(Testimony of Leonard Sherman.)

Q. That is pretty indefinite.

A. Sometimes $50.00 or $60.00.

Q. That was not the amount you gave back or put back in the machines?

A. Oh, no, in the phonograph if there was a few nickels or dimes I would just give that back.

Q. As to the money that you took out of the machines, that would come out of the cash box?

A. Yes, that would come out of the cash box.

Q. Was that all entered in the book, the amount that came out of the cash box?

A. No, that would come off the top.

Q. What do you mean by that?

A. Well, if there was a $100.00 in the box and if they had a ten or a fifteen dollar pay-out, that would come out first, that would be deducted and then we would sit down and divide the rest.

Q. That is what you are referring to by pay-out? A. That is right.

Q. How often would that occur?

A. Well, sometimes once or twice a week, or whenever I made the collections, it would vary in different places. [331]

Mr. Emigh: I believe you may take the witness.

Cross Examination

Q. (By Mr. Patten): Where are you employed now? A. The North Idaho Sales Company.

Q. Where is your office in town here?

A. At 105 West Sherman.

Q. During 1945 and 1946 what territory did you

(Testimony of Leonard Sherman.)

cover for Mr. McFee? A. Kootenai County.

Q. How many machines did Mr. McFee have in the county in 1945 and 1946?

A. Well, I would say 125 to 150.

Q. In a general way what was the break-down of those machines, what denominations were they?

A. Different ones, mostly nickels and dimes, all coin operated devices.

Q. During those years, how much did the machines average?

A. Well, that is pretty hard for me to answer to each individual machine.

Q. Well, take the five cent machines, in a good location take any five cent machine?

A. Probably $50.00 a week.

Q. How often did you make collections? [332]

A. Once a week, sometimes every two weeks on some of them.

Q. How much would a ten cent machine average in a good location, how much would they take in?

A. Sometimes not as good as a nickel machine.

Q. And what about the twenty-five cent machines, how much would they take in?

A. Oh, $75.00 or $80.00 a week.

Q. The fifty-cent machines what about those, what would they take in?

A. Well, that is another question, sometimes a fifty-cent machine didn't take in anything, it depends on where it was at.

Q. Where was the best location during those years? A. Well, that is hard to say.

(Testimony of Leonard Sherman.)

Q. In 1945 and 1946 did it change or what, generally what was the best location during those years?

A. Well, that I don't remember, no, I don't remember which was the best.

Q. You said 150 machines, was that about an average or did you sometimes have more?

A. Didn't have any more, at least not very many, it generally came down.

Q. Did you have more machines in 1945 or more in 1946?

A. Well, it was pretty close to the same, that is hard to remember.

Q. About how many locations were these machines in; how many [333] locations did you have to serve?

A. That I don't remember either, sometimes a lot or quite a few were in one location and then I had places where there was a dime or a nickel or maybe a nickel and a dime machine in one location.

Q. Will you name the locations that you had, the number of machines in 1945 and 1946?

A. In 1945 and 1946 I don't remember that either, I don't remember where they were.

Q. Where was the best location, that is what I intended to ask?

A. Well, I don't remember where the best location was.

Q. Where in the county here did Mr. McFee have his machines in 1945 and 1946?

(Testimony of Leonard Sherman.)

A. In the beer taverns.

Q. I mean the names of the places?

A. Well he had,—let's see where it was,——

Q. ——Let me say this, take the Last Chance, did he have slot machines there?

A. Yes, sir.

Q. You worked for 12 years collecting from those machines, can't you tell us where the machines were?

A. There was some at Spirit Lake; some at Rathdrum——

Q. ——What places there?

A. Where do you mean now?

Q. Rathdrum, what places?

A. Well, there was also Shady Rests. [334]

Q. The only place in Rathdrum?

A. I think it was Masterson's tavern at Rathdrum, I just don't know if that is correct or not at that time.

The Court: We will recess at this time until 2:00 o'clock.

April 29, 1952, 2:00 o'clock p.m.

Q. Mr. Sherman, when recess was had you were going to list for us the places where Mr. McFee had slot machines and I believe you mentioned Spirit Lake, Shady Rest and a tavern in Rathdrum.

A. That is right.

Q. Shady Rest, do you have any connection with this place? A. Yes.

Q. What is that connection?

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(Testimony of Leonard Sherman.)

A. My mother owns it.

Q. Is there any indebtedness on this tavern?

A. Yes.

Q. To whom is that indebtedness?

A. Mr. McFee.

Q. Do you have a brother? A. Yes, sir.

Q. Just one? A. No. [335]

Q. How many do you have? A. Three.

Q. What are their names?

A. Clarence, Walter, and Frank.

Q. Have your brothers ever been employed by Mr. McFee? A. One of them.

Q. Is that Walter? A. Yes, sir.

Q. For how long?

Mr. Emigh: I have no objection to this examination except that I think it is immaterial and it is not proper cross examination.

The Court: I don't know what the purpose of this is, but he may proceed.

A. I forget just how long he was there but I believe about one year.

Q. When was that?

A. I don't remember when that was, I don't even remember the year.

Q. Would you continue now to name the locations which you worked during 1945 and 1946 where Mr. McFee had slot machines?

A. How can I remember all of those places?

The Court: Mr. Witness, if you don't remember, just say so.

A. I don't remember. [336]

(Testimony of Leonard Sherman.)

Q. You say that he had 150 machines and you can only remember three places?

A. I can remember the places but I can't remember who had them. They changed hands all of the time.

Q. Will you list as many as you can?

A. I can't list those, it is just like I say they are liable to change their names any time; I just can't remember.

Q. Did he have slot machines at the El Capitan?

A. Now you mean?

Q. In 1945 and 1946? A. Yes.

Q. Did he have any slot machines at the Last Chance?

A. Yes, I answered that a while ago.

Q. But you can remember no other places that he had slot machines?

A. I can remember the places but I don't know the names.

Q. Did anyone else work this route besides you?

A. Yes, I had other help.

Q. Did they collect the money out of the slot machines? A. Once in a great while.

Q. During 1945 and 1946 once a week you went around to those places?

A. Sometimes if I was busy I would send one of the other fellows out.

Q. And you can't remember what those places were?

A. Just like I say some of them I do, some were changed all of [337] the time, every time I went

(Testimony of Leonard Sherman.)

around it seemed some changed their names.

Q. Do you have slot machines, or did you at that time at Hauser Lake?

A. I don't remember whether it was that year or when it was.

Q. Would the mention of Woodland Beach refresh your memory?

A. Yes, but I don't remember that.

Q. Would the mention of Glen's refresh your memory or W. J. Matchly?

A. I don't remember names like that.

Q. Isn't it a fact that you had slot machines out there? A. Yes, sir.

Q. You remember that you had slot machines out there?

A. Yes, but I don't remember what year it was.

Q. Do you remember that you didn't have slot machines there in 1945 or 1946?

A. No, I cannot say that, just like I told you before I don't know what year those were there.

Q. You still have machines out at Hauser Lake and at the Woodland Beach Resort?

A. Yes, and phonographs.

Q. And you still go out there once a week but you don't remember that you had slot machines out there? A. Just like I said.

Q. Isn't it a fact that you had an agreement with people that you mentioned for you to report only 40 per cent of the [338] receipts, or for them to report only 40 per cent of the receipts to you and you only to report 40 per cent?

(Testimony of Leonard Sherman.)

A. Will you state that again?

Mr. Purdy: We object to that as incompetent, irrelevant and immaterial and not proper cross examination.

The Court: He may answer.

Q. Yes, I will ask it again. Isn't it true that you had an agreement with the proprietors of the Woodland Beach Resort so that you and they would report only 40 per cent of the receipts from the slot machines? A. Absolutely not.

Q. Are you familiar with the book?

A. Yes, I am.

Q. Did you fill one out for each machine at each location? A. No.

Q. Did you make some record in that book of all the money that you took out of these machines?

A. Yes, sir.

Q. And what did you do with those books?

A. I brought them into the office.

Q. And are they still there?

A. I don't know.

Q. Do you know where they are?

A. No, I do not.

Q. Have they been moved from your office?

A. That I cannot tell. [339]

Q. You are the manager of the place?

A. That is right but I check my books in to the office girl.

Q. Have you seen those books after you turned them in? A. No, sir.

Q. You have no idea where they are?

(Testimony of Leonard Sherman.)

A. They are out of my hands when I turn them in to the girl in the office.

Mr. Patten: I think that is all.

Redirect Examination

Mr. Emigh: May I ask a question or two that I should have asked on direct?

The Court: Yes, you may.

Q. Mr. Sherman, on the term pay-out, we went into that this morning and I don't believe you identified what a pay-out is.

A. A pay-out is if the machine makes a short pay then the proprietor in the location pays that out or when he pays a jackpot and then when I come in I pay that money back.

Q. Then as I understand this machine on the jackpot, or if it didn't pay the cash in full or the full amount of the jackpot then the proprietor pays that? A. That is right.

Q. The proprietor always pays that out? [340]

A. That is right.

Q. And when you make the collection would he give a memorandum of what he paid out?

A. He would have a piece of paper and have it written down so that I would know how many pay-outs there was.

Q. That is money off the top as you said this morning, that reimbursed to him for the pay-outs?

A. Yes, sir.

Q. Was there an even division of the pay-outs between you and the proprietor or was it all taken

(Testimony of Leonard Sherman.)

out of the cash box of the machine?

A. No, if the pay-out amounted to one dollar or to five dollars when we take the cash box out I would give him that amount and split.

Q. You gave him the entire pay-out and then proceeded with the division?

A. That is right.

Q. And would Mr. McFee or the North Idaho Sales Company receive any part of that pay-out?

A. No.

Q. I think you have testified that you were servicing about 150 machines? A. Yes, sir.

Q. What different kind of machines were you servicing, were they slot machines, pin-balls and phonographs?

A. All of them, slot machines, phonographs and free plays. [341]

Q. You have no way of knowing how many of each there were? A. No, sir.

Mr. Emigh: That is all.

Recross Examination

Q. (By Mr. Patten): Have you seen those route slips since you turned them into the office?

A. No, sir.

Q. Are those machines of McFee's set tight or were they loose machines?

A. They were fairly loose.

Mr. Patten: That is all.

Mr. Emigh: That is all.

RICHARD FIELDS

Called as a witness for the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Purdy): Your name is Dick Fields?

A. Yes, sir.

Q. Where do you reside? [342]

A. Wallace, Idaho.

Q. Are you a married man? A. Yes, sir.

Q. By whom are you employed?

A. Mr. McFee and the North Idaho Sales Company.

Q. How long have you been employed by Mr. McFee? A. Since September, 1945.

Q. You have been employed by him since that time? A. With the exception of one year.

Q. What year?

A. That was in 1949 and 1950.

Q. What are your duties with the North Idaho Sales Company?

A. More or less route supervisor.

Q. What do you mean by that?

A. Well I do the ordering of the records for the phonographs and part for the slot machines when we are out of them and I do a portion of the buying, supplies such as title strips and some other equipment.

Q. Do you have anything to do with collections?

A. Yes, sir.

Q. Are you familiar with how they are handled?

A. I am.

(Testimony of Richard Fields.)

Q. Will you just describe to the Court and the jury when you go to a location to make collections what takes place?

A. I start out with the books that contain the accounts, the reports and the keys; I contact the owner or manager; I [343] have the keys for the machines I open it up and open the cash box, dump it on a table and if he has any pay-outs, whether it is a slot machine or a phonograph or what, we take that out first and count the money the gross is entered, and it gives the date and the kind of machine, we put the total amount, the gross take of the machine and then it is divided.

Q. As to the pay-outs, that money is taken out of the machine and given to whom?

A. To the location manager or owner because he took it out of his cash register to pay out.

Q. You have no way of telling the number of pay-outs?

A. All we do is take his word for it.

Q. Who has the keys to those machines?

A. I do, most of the time.

Q. I will ask you whether Mr. McFee ever made collections during the time you were employed?

A. Never.

Q. What do you do with the money after you collect it?

A. I have to check it against my books and I deposit the money myself, the deposit book has to tally with the collections.

Q. You deposit in the bank; you do that?

(Testimony of Richard Fields.)

A. Yes, sir.

Q. You account for the money that is deposited in the bank from the first of July until the 31st of July,—would [344] there be any way that you could check that balance with your records?

A. These books have to tally with every deposit.

Q. When that money is put in the bank to whose credit is it deposited?

A. The North Idaho Sales Company.

Q. Now, Mr. Fields, you will notice on these books, on page number one you will notice a number in red, does that show on the three sheets?

A. That is right.

Q. What happens to be the number on that one?

A. 106-1.

Q. Mr. Fields, that is on there for what purpose?

A. That is put on by the printer so that you can run the books numerically.

Q. The number on the outside written in pen and ink, who puts that on?

A. That is put on in Wallace by the girl that book is charged out to Wallace or Coeur d'Alene office. This book, if it is charged to me my name is there and the number and I am charged with the book and responsible for it until all of that book is filled.

Q. Has there been any occasion when machines would be continually making pay-outs to such an extent that it would be detrimental to the business?

A. There has been such an occasion. [345]

(Testimony of Richard Fields.)

Q. What do you do in a case of that kind?

A. We check it for mechanical failure.

Q. If you find no mechanical failure, what do you do?

A. We pull it out, we take it out of the location for the reason that we figure that we are being taken.

Q. If you find mechanical failure, what do you do?

A. Repair it but if we don't it is taken out.

Q. Has it occurred in your experience as a collector that you have collected any money that you turned over to Mr. McFee directly in cash?

A. Never.

Mr. Purdy: You may inquire,—just a moment, another question.

Q. Just explain that once more on this pay-out proposition.

A. Well, suppose that you were playing a machine and you lined up the oranges and the machine failed to pay 10 coins, you would turn to the owner of the place and ask for full payment, would you not? Then he would turn to his till and pay you the differences that you should have gotten and he will make that out on a tab or on some memorandum and when I come around to check the machine I take that figure, but I see that it is within reason and then I pay the man for the gross receipts. From that time on in the accounting, that is when the division is made.

Q. Would that show on the stub of the book?

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(Testimony of Richard Fields.)

A. There is no reason to show it on the book. [346]

Q. Why?

A. The money belongs to the location and not to us.

Mr. Purdy: That is all, you may examine.

Cross Examination

Q. (By Mr. Patten): Mr. Fields, are you familiar with the Fields Distributing Company of Seattle? A. That is my father.

Q. Are you related to Mr. McFee in any other way than in business?

A. I am married to his step-daughter.

Q. You were the manager during 1945 and 1946? A. Part of 1945.

Q. And all of 1946? A. Yes, sir.

Q. You were the manager of a certain group?

A. Yea.

Q. Will you tell us how many machines Mr. McFee had in or during 1945 and 1946?

A. I cannot say how many he had in 1945.

Q. You were a route manager?

A. Yes, sir.

Q. How many did he have when you were there, how many during the first three months that you were there? [347] A. 250 to 300.

Q. In all of Idaho?

A. No, not all of Idaho.

Q. You had nothing to do other than to collect?

A. Yes, buying supplies and so on.

(Testimony of Richard Fields.)

Q. How many machines did Mr. McFee have in Shoshone County in 1946? A. 100 to 150.

Q. Slot machines?

A. Combination of all, slot machines, phonographs and pin-ball machines.

Q. Would you enter the slots on the books such as Exhibit No. 39 or is that just phonographs?

A. All of the machines.

Q. How many slot machines were there?

A. Around 75.

Q. Did you have a list of the locations where those machines were?

A. We didn't need a list, we knew where they were.

Q. Will you tell the jury and the Court where they were?

A. Well, 23 bars in Wallace and I venture to say that there was one or two machines in every bar.

Q. Did you have any in Burke?

A. A few, two locations in Burke.

Q. And in Mullan? A. About six. [348]

Q. Six machines? A. No, six locations.

Q. How many machines were there in a location? A. Not over two.

Q. How about Kellogg?

A. Didn't have much of an operation in Kellogg, mostly phonographs.

Q. Did you have any slot machines?

A. Two locations.

Q. How many machines in each?

(Testimony of Richard Fields.)

A. Three in one and two in the other.

Q. Did you have any other towns in Shoshone County where there were machines?

A. Not in 1945 or '46, I don't believe.

Q. Did you know all of the slot machines in Shoshone County, to whom they belonged?

A. In 1945?

Q. And also in 1946? A. Absolutely.

Q. Do you know whether Mr. McFee had any personal machines besides those that you serviced?

A. Not to my knowledge.

Q. Do you know that he didn't have any?

A. I would say yes, that he didn't have any.

Q. Do you know that he didn't have any outside of Shoshone County?

A. I cannot tell you about that. [349]

Q. Were slot machines legal in Shoshone County in 1945?

A. As far as the Federal Government was concerned, yes.

Q. As far as the State of Idaho was concerned?

A. I cannot tell whether they were or not.

Q. If you were the manager of the group, you mean that you didn't know whether the business was legal or illegal?

A. I wasn't an attorney and I didn't look up the law.

Q. Do you know whether they were legal or illegal in 1946? A. No, sir.

Q. How about 1947?

(Testimony of Richard Fields.)

A. They were passed in 1947, yes, they were brought out.

Mr. Patten: That is all.

Redirect Examination

Q. (By Mr. Purdy): In 1945 and 1946 it was common knowledge that slot machines were operated in Shoshone County? A. That is right.

Q. Now, in connection with the locations in Kellogg, were there other operators in Kellogg?

A. There were.

Q. And did that account for the number of locations that you had? A. It did.

Mr. Purdy: That is all. [350]

Recross Examination

Q. (By Mr. Patten): You have seen Exhibit No. 39? A. Yes.

Q. When you complete a slip what do you do?

A. I turn them to the office.

Q. Do you know if they are still in the office?

A. To the best of my knowledge they are.

Q. Have you seen them since you turned them in? A. No, I have not.

Mr. Patten: That is all.

Mr. Purdy: That is all, you may be excused.

CHARLES PARSONS

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): What is your occupation, Mr. Parsons? A. Mechanic.

Q. By whom are you employed?

A. The North Idaho Sales Company.

Q. By whom were you employed in 1945 and 1946? [351]

A. The North Idaho Sales Company.

Q. During that entire period or a portion of it?

A. The whole thing.

Q. Were you collecting during that period?

A. I was.

Q. Where were you collecting from?

A. Lewiston, Idaho.

Q. Were you collecting during that entire period? A. I was.

Q. Will you describe to the Court and jury the operation as you did it when you made those collections, what did you do first?

A. When it came regular collection time I would take the book, the report and the keys and start out and go around to each location. I would count the money, divide it up and they would keep their part of it and I took my part of it back to the office and I gave the girl the book and the money when I got back, I would dump the change on the counter and she would count it. It had to check

(Testimony of Charles Parsons.)

with the book, she took the money to the bank afterwards.

Q. You had an office at the North Idaho Sales Company? A. Yes, sir.

Q. You turned the collections and the book into the office girl? A. Yes, sir.

Q. In connection with the division of the money, how was that [352] handled, the money that was taken out of the different machines?

A. Just going over what these other fellows have said; if there was any pay-outs it came off the top and then we split.

Q. The pay-outs would be the money the proprietor had paid for either jackpots or when the machine didn't pay or where the machine failed to pay full amount when a winning combination showed on the dial, where it didn't pay at all or where the pay was short? A. That is right.

Q. That money would be paid to the location?

A. Yes, sir.

Q. That is if the machine didn't pay?

A. Yes, sir.

Q. The location man would be reimbursed for what he had paid out? A. Yes, sir.

Q. Was all of the money divided then?

A. Yes, sir.

Q. Was he given anything to show that he had received a division on that money?

A. We had a collection book and his copy was an indelible copy.

Q. Just one copy was given to him?

(Testimony of Charles Parsons.)

A. Yes, sir.

Q. One copy and the tissue was kept?

A. Yes. [353]

A. A single copy was kept in the book?

A. Yes, sir.

Q. Would he sign the book when you paid him?

A. Yes, we both signed.

Q. When you made the collections was all of the money distributed that was in the cash box?

A. That is right.

Q. After the deductions were made and you distributed or divided the money, that was shown in the book? A. It was.

Q. And you turned those in, the book and the money in the manner that has been described here?

A. That is right?

Q. Did you ever pay any money directly to Mr. McFee before it was turned into the office?

A. No, sir, I didn't.

Q. Who had the keys to the machines?

A. I did.

Mr. Emigh: That is all, you may examine.

Cross Examination

Q. (By Mr. Rossi): Mr. Parsons, you stated that the pay-off consisted of short pays and jackpots?

A. There are several ways that you could be short, take a [354] phonograph and if they put a quarter in and it plays only tune then of course, they holler for their 20 cents, it is not our money,

(Testimony of Charles Parsons.)

it belongs to the machine, or rather to the manager of the location.

Q. In connection with slot machines the jackpots are in the machine or rather they are in until paid? A. Yes, sir.

Q. Any pay-offs that come from slot machines or rather for the slot machines were purely where the coins were short? A. That is right.

Q. It would be a very small part of the take of the machine?

A. That is right, sometimes not any.

Q. So jackpots were not taken out of the cash box? A. That is right.

Q. When you turn these slips into the office, did you deposit the money yourself?

A. No, the girl did that.

Q. Then you don't know of your own knowledge whether or not the money you turned into the office was actually deposited? A. Yes, I do.

Q. What do you mean when you say you do?

A. We send the slips to Wallace, to the head office.

Q. Since returning the receipts to the office, have you had occasion to examine them, the receipts in the books, have you examined them or have you had occasion to see them again? [355]

A. No, sir, I have not.

Q. Do you know whether they are in the Lewiston office?

A. No, they went to the Wallace office.

Q. Do you know where those are kept?

(Testimony of Charles Parsons.)

A. No, sir, I don't.

Q. Did you have access to the safe in the Lewiston office? A. Yes, sir.

Q. Was any money kept in that safe?

A. None other than the collections that I had.

Q. What collections you made?

A. Yes, sir.

Q. Who had access to the safe?

A. I did and the office girl, also.

Q. Did Mr. McFee have the combination to that?

A. No, sir, he didn't.

Q. How do you know that?

A. In my mind he does not have it.

Q. But he may have?

A. I don't think so.

Q. But you don't know whether he had the combination to the safe or not?

A. No, sir, I don't know.

Q. Do you know whether he kept any personal money in that safe?

A. Not in there, no, sir.

Q. No packages or containers with money in that safe belonging to Mr. McFee?

A. No, sir, nothing. [356]

Q. During 1945 or 1946?

A. No, sir, none, that is right.

Q. Have you ever been convicted of a felony?

A. No, I have not.

Mr. Purdy: Now we object to the remarks of counsel, unless he has some reason for bringing that up.

The Court: He has answered.

Mr. Rossi: That is all that we have.

Mr. Emigh: No further examination.

LUCILE DOLAN

Called as a witness for the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): Where do you live, Miss Dolan? A. Coeur d'Alene.

Q. How long have you been a resident of Coeur d'Alene? A. Eight and one-half years.

Q. What is your occupation?

A. Working for the North Idaho Sales Company in the office.

Q. What work do you do?

A. Take care of the records, bookkeeping, make the bank deposits and take care of the telephone. [357]

Q. You speak of making bank deposits, who do you make those for?

A. For the North Idaho Sales Company now but I formerly did for the Foresters Club.

Q. From whom did you receive the money that you banked? A. From the collectors.

Q. When you received that money what did you receive with the money, if anything?

A. The collection book.

Q. In case of the coin operated machines, did you receive the book with those collections?

A. Yes, sir.

(Testimony of Lucile Dolan.)

Q. And is that book checked against the amount of money that you received? A. Yes, it is.

Q. And did they or do they correspond?

A. They have to before we make the deposit.

Q. When you receive any money that is not collected from the coin operated machines, what kind of evidence do you receive as to the amount of money that is turned in?

A. I don't understand just what you mean.

Q. In the case of coin operated machines, do you get a book like Exhibit No. 39? A. Yes, sir.

Q. Suppose the proceeds of the Foresters Club are turned in—the money from the club aside from that which comes from [358] the coin operated machines——

A. ——You mean what is taken from the cash register?

Q. Yes, or whatever it is.

A. We get a daily report with that.

Q. And do those daily reports show the amount of money that you deposit?

A. How much is taken in and about twice a week I deposit it in the bank.

Q. How often did you make deposits?

A. For the Foresters Club or the North Idaho Sales Company?

Q. Well, for the North Idaho Sales Company?

A. When a collection is filled, we might make it in two weeks, or it might be every week, the collection book has to balance with the money, or the

(Testimony of Lucile Dolan.)

amount taken in has to balance with the collection book.

Q. That is not under a daily deposit system?

A. No, sir.

Q. You might hold those collections for some time.

A. Yes, it might be a week or two.

Q. And it might be more than that, longer?

A. Yes, in the winter it might be.

Q. Does the deposit which you make from other sales or other money than collections from the coin operated machines check with the cash report or daily report which you receive with it?

A. Yes, sir. [359]

Q. And that includes the cash register tape?

A. Yes, sir.

Q. What have you to do with paying out the money there? A. What do you mean?

Q. I mean do you draw checks?

A. Not at the North Idaho Sales Company, but at the Foresters Club I did, I paid the help.

Q. You paid the employees of the Foresters Club? A. I did at that time, yes, sir.

Q. Would you draw checks for any other purpose or purposes? A. Yes, sir.

Q. In this office where you are I understand there are a few thousand records, phonograph records? A. Yes, sir.

Q. Is that a part of the business, to deal in those?

A. Yes, we have them for our machines.

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(Testimony of Lucile Dolan.)

Q. And what do you do in regard to those records?

A. I pick out the records for the locations and I type the title strips.

Q. And did you pay for those records?

A. They are paid for in Wallace and sent to us.

Q. Did you have occasion to pay out money for other purposes?

A. Not for the North Idaho Sales Company.

Q. Other than the payroll?

A. I didn't pay off the payroll for the North Idaho Sales Company. [360]

Q. For the Foresters Club?

A. Yes, I did for the Foresters Club.

Q. Have you any recollection of having been directed by anyone to pay off money for Mr. Sonduck in the spring of 1945?

A. Well, I have a note on the stub where I gave him $2,000.00 for Mr. McFee and that Mr. McFee reimbursed me for it, I gave him a note.

Q. What money was that paid out of?

A. The money for the collections, Mr. McFee called and asked us to give it to him.

Q. At whose direction was that given out?

A. Mr. McFee's.

Q. Was it replaced by Mr. McFee?

A. Yes, sir, it was.

Q. Was that before you made the deposit?

A. We had to get it back before we made the deposit.

Q. Mr. McFee replaced that out of personal

(Testimony of Lucile Dolan.)

funds? A. Yes, sir.

Q. And the replacement of that amount was not out of the North Idaho Sales Company funds, so far as you know? A. No, it was not.

Q. Do you have any recollection of a considerable amount of whiskey being delivered to the North Idaho Sales Company in the years 1943 and 1944?

A. Never to the North Idaho Sales Company.

Q. Who was the liquor delivered to, if you know? [361] A. To the Foresters Club.

Q. The North Idaho Sales Company had nothing to do with it? A. Absolutely not.

Q. Do you know or did you know the amount of that? A. I don't know.

Q. Do you know how it was distributed?

A. A part to the Foresters Club at Lewiston and a part of it to this Foresters Club and a small amount to the Gem Club at Athol.

Q. As it was distributed to the Foresters Club, that part, do you know how it was paid for?

A. In cash, as they used it the money was taken out of the register or by check.

Q. Did that money go to the North Idaho Sales Company? A. No, sir.

Q. To whom did it go? A. Mr. McFee.

Q. You have no knowledge of the amount of it?

A. No, because it was at different times.

Q. Was it for considerable amounts?

A. Yes, sir, it was.

Q. That was generally the way it was handled?

A. Yes.

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(Testimony of Lucile Dolan.)

Q. And when it was available it was for the supplying of the Foresters Club?

A. Yes, sir. [362]

Q. Do you know when the Gem Club closed?

A. I think it was in 1945.

Q. Was it early or late?

A. I don't know but I would say it was late, I would say it was late in the year 1945 but I am not sure.

Q. You would not be positive about that?

A. No, I am not positive.

Q. The testimony here indicates that the collectors turned in money to your office and that the Foresters Club turned in money to your office, was all of the money deposited in the bank that you received from those sources? A. Yes, sir.

Q. And is that on your records?

A. Yes, sir, that is right.

Mr. Emigh: You may take the witness.

Cross Examination

Q. (By Mr. Patten): Now, Miss Dolan, when did you go to work for the North Idaho Sales Company? A. In September of 1943.

Q. What did you do prior to that time?

A. I came from St. Paul.

Q. What was your occupation?

A. I worked for the Mayflower Distributing Company, they distribute [363] phonographs and such.

Q. Is that the business with which Tom Terran

(Testimony of Lucile Dolan.)

and Herman Pastor are connected?

A. Yes, sir.

Q. How long were you with the Mayflower Distributing Company?

A. About three years, I believe.

Q. What did you do prior to that time?

A. Well, I worked for Montgomery.

Q. What kind of business is the Mayflower Distributing Company?

A. Distributors for Wertzler and Bally Company, manufacturer of pin-ball machines and the Mills Company of Chicago, they handled phonographs and these others.

Q. What does the Mills Company manufacture?

A. Slot machines and phonographs.

Q. We discussed Exhibit No. 39 here, which is the collection book, did you receive those collection books from the machines in Coeur d'Alene?

A. Yes, and the collections.

Q. Yes, the collections and the books?

A. Yes, sir, they were turned over to me.

Q. What did you do with them?

A. I checked them to see that the money corresponded with the books and I sent the book with the bank deposit slip to Wallace, Idaho.

Q. Have you seen them since that time? [364]

A. No, sir.

Q. Is there a safe in your office?

A. Yes, sir.

Q. Who has the combination of that safe?

A. I have one and Mr. Sherman has one.

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(Testimony of Lucile Dolan.)

Q. Does Mr. McFee have the combination?

A. No, sir.

Q. Are you positive?

A. Yes, we had the combination changed and it was given to me and no one else has it.

Q. When did that happen?

A. Probably in 1944, it was in 1943 or 1944.

Q. Did Mr. McFee have any personal funds in this safe? A. No, he hasn't.

Q. Did he ever ask you to keep money for him?

A. Not to my recollection.

Q. What was your position with respect to the Foresters Club? A. I was bookkeeper.

Q. When were you bookkeeper?

A. I beg your pardon?

Q. Was that in September of 1943 that you became bookkeeper?

A. I think I didn't start until January, 1944, to keep its books.

Q. You testified that while you were the bookkeeper of the Foresters Club that the Foresters Club made payments to Mr. McFee for liquor? [365]

A. That is right.

Q. Were those payments in cash or by check?

A. Part cash and part by check, I cannot say which was the most, it would depend on how much cash we had on hand. If we wanted to pay for some liquor and there was enough money in the bank, I wrote a check, if it was a smaller amount we usually paid it in cash.

Q. How did you pay the other bills, for mer-

(Testimony of Lucile Dolan.)

chandise and wages? A. All by check.

Q. Those particular purchases that you paid by currency, did you enter that in the books?

A. Yes, sir.

Q. Was that through the purchases?

A. Yes, sir.

Q. What was the reason that this transaction was handled, the one I mentioned, any differently than the others?

A. I don't know of any particular reason why it was done that way, there was no special reason, but if anything would go into the storage room there would be a certain amount needed and when I checked the goods out I would take that amount out, it was put in an envelope.

Q. Let me ask, did you pay any other bills in currency?

A. All of the liquor bills, all of the liquor at the liquor store was in currency.

Q. Besides liquor was there any other bills that you paid in currency? [366]

A. That is all that is shown on the daily report.

Q. Those payments were not only in 1944?

A. Possibly all through the years, at different times as they used the liquor.

Q. And were paid to Mr. McFee?

A. Yes, sir.

Q. Have you any idea of the total amount of those payments?

A. No, it would depend on the amount they used.

Q. Would that be in your books? A. Yes, sir.

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(Testimony of Lucile Dolan.)

Q. In the Foresters Club's books?

A. Yes, sir.

Mr. Patten: I believe that is all.

Redirect Examination

Q. (By Mr. Emigh): The North Idaho Sales Company had nothing to do with the liquor account? A. That is right.

Q. And your knowledge comes from being bookkeeper for the Foresters Club, that is, your knowledge of that liquor?

A. That is right, yes, sir.

Mr. Emigh: That is all. [367]

Recross Examination

Q. (By Mr. Patten): You started to work in September of 1943 for the North Idaho Sales Company? A. Yes, sir.

Q. You became associated with the Foresters Club in January, 1944.

A. I think that is correct, if that is the Foresters Club in Coeur d'Alene.

Q. Yes, let me ask you, are you certain of those dates? A. I think it was in January.

Q. And did you have access to the books of the Foresters Club? A. I took care of them.

Q. Do you have access to them now?

A. No, those books were sent to Wallace when the club was closed.

Q. You do not have access to them now?

A. No, sir.

(Testimony of Lucile Dolan.)

Q. Isn't it a fact that the checks to Mr. McFee which you mentioned, I believe they were checks numbered 653, 750, 753, and 756 all dated August 2, 1943, which were cashed, totaled the amount of $17,550.78?

A. I wasn't there at that time.

Q. You testified that you paid Mr. McFee the money. A. Not in 1943.

Q. You didn't say that you paid him the money?

A. I didn't say that I paid for 1943, I said that some was paid by check and it would have to be in 1944. [368]

Q. And what did you pay that with?

A. Foresters Club funds taken from the bar.

Q. And those payments were entered in the books?

A. That is right, from the daily report and entered in the books.

Q. Do you have any idea of the amounts?

A. No, it would be different amounts at different times as they used that liquor.

Q. Did you draw a check and get the cash or did you take the cash out of the till?

A. Out of the till and charged it to liquor.

Q. And entered it in your books?

A. That is right.

Mr. Patten: That is all.

Redirect Examination

Q. (By Mr. Emigh): At the time you spoke of getting the liquor could it be purchased by check anywhere else.

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(Testimony of Lucile Dolan.)

A. No, it could not, it couldn't even be purchased by check at the liquor store.

Q. Not even at the liquor store?

A. That is right.

Mr. Emigh: That is all.

Mr. Patten: No further questions. [369]

JOHN N. NEWLAND

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): What is your business or profession? A. Certified Public Accountant.

Q. How long have you been such?

A. For nine years.

Q. Where do you reside?

A. Butte, Montana.

Q. Do you maintain an office there?

A. Yes, sir.

Q. With whom are you associated?

A. With Mr. E. R. Blinn.

Q. Do you maintain a branch office?

A. We are connected with an office in Missoula.

Q. Have you made any endeavor to determine what investments were made by Mr. McFee in the years 1927 and 1928, if any in stocks?

A. I have.

Q. You made an investigation to determine what if any investments in stocks by him in those years? A. I have. [370]

(Testimony of John N. Newland.)

Q. What effort did you make?

A. Mr. McFee informed me that he had considerable investments in 1927 and 1928 and that the stocks were purchased through stock-brokers in Wallace, therefore, I determined how many stock brokerage firms there were in Wallace and I found that only one of several that existed at that time, according to information which was supplied to me which was still operating under the name Pentulana Company.

Q. Are the present Pentulana people the same people that had the company—strike that, is the Pentulana Company composed of the same people now as in 1927, are they the same ones?

A. I don't think that they are.

Q. Did you endeavor to get stock books from them?

A. I learned that the books for the years 1927 and 1928 were in a basement and I endeavored to get them to give me permission to look for those books.

Q. Did you get permission? A. Yes, sir.

Q. And did you make a search?

A. Yes, sir.

Q. And did you find those old books?

A. Yes, sir.

Q. Did you make inquiries as to the persons that kept those books at that time?

A. No, I didn't.

Q. Did you make any inquiry for them? [371]

A. No, I didn't.

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(Testimony of John N. Newland.)

Q. The books which you have, which you found, are in your poossession? A. Yes, sir.

Q. And have they anything in them to identify them as the books as the Pentulana Company?

A. This one has a stamp Alexander Pentulana, Wallace, Idaho.

Q. Did you find similar or other evidence on other books?

A. I found evidence on these (indicating).

Q. You may state whether those books have the appearance of being old books and if they had such appearance when you found them?

A. They do and they did.

Q. What records did you find?

A. The cash book and the day book, those are day books.

Q. What have you to say as to whether the records you found in the day book are reflected into the cash book?

A. I checked some into the cash book.

Q. It is your belief that those are genuine records? A. It is.

Q. I ask you to refer to those books and ask if you can find a record of a purchase of stock by Mr. McFee during the period that I mentioned.

Mr. Rossi: I object to this, the books are not identified by any officer or agent of the Pentulana Company or any one in possession of these books and we object until they [372] are identified.

The Court: At present I will sustain the objection.

(Testimony of John N. Newland.)

Q. Did you ascertain who the present managers of the Pentulana Company are or that they are not the same persons who had that company back in 1924, '25, '26, '27, and '28?

A. The owners were not the same.

Q. The present owners could not identify the books?

A. They could not identify the books.

Q. From whom did you get permission to look in the basement?

A. Permission was obtained from—I forget the name now.

Q. Was she the lady that owned the building?

A. I think she owned the building and at one time was interested in the Pentulana Company.

Q. Was that Mrs. Kingsbury?

A. Yes, sir, it was.

Q. And with permission from her you did obtain those books?

Mr. Emigh: I think that is sufficient identification, if the Court please.

The Court: Have you examined those books?

Mr. Rossi: No, we have not.

The Court: Only the party or parties who made the entries in the books could identify those entries, or someone who was familiar, no one here or offered as a witness yet could say the entries are genuine and I might say in advance of the questions that I think you are going to ask, I cannot see how they are material. I will let counsel for the Government

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[373] examine the books and I will take the question under advisement at this time.

Mr. Emigh: May I suggest that I would like to call Mr. Blinn to the stand for a minute.

The Court: Very well, you may do that.

E. R. BLINN

Called as a witness by the defendant, after being first duly sworn, testifies as follows.

Direct Examination

Q. (By Mr. Emigh): Will you state your business, profession or occupation?

A. Certified Public Accountant, a member of the firm Newland and Blinn.

Q. What training have you had in that line?

A. Public accounting work for 30 years and a half out here and a year and one-half in Chicago.

Q. What education do you have?

A. A Bachelors and Masters degree from Northwestern.

Q. Are you certified as an accountant in Montana? A. Yes, sir.

Q. And in Illinois? A. Yes, sir.

Q. I will ask you in connection with an endeavor to find [374] stockholdings of Mr. McFee prior to the year 1936 and for some years prior thereto if you took part in a search with Mr. Newland as he has referred to it? A. Yes.

Q. Before doing that did you get permission from a lady to go into a basement in the old office of the former Pentulana Company?

(Testimony of E. R. Blinn.)

A. I had someone that knew her get permission and I might say I got permission through Mr. McFee and Mr. Emasio, they contacted Mrs. Kingsbury.

Q. You got that permission? A. Yes, sir.

Q. Did you ascertain that there were people available who had any charge of those books and made any entries?

A. They said that the people who kept the books were, so far as they knew deceased. Mrs. Kingsbury stated that she didn't know about the business activities.

Q. Did she indicate that——

Mr. Patten: ——Now just a moment, I think that is quite objectionable——

Mr. Emigh: I will withdraw that.

Q. It was on this information that search was made and books found? A. Yes, sir.

Q. What have you to say as a certified public accountant as to your opinion that these books are genuine? [375]

A. The books are genuine, they are records of the Pentulana Company for that period.

Mr. Patten: I move to strike that as his opinion without evidence to support it.

The Court: I will let the answer stand. What years were these books for, that is what years do they refer to?

Mr. Patten: I understand that it is for '27 and '28.

(Testimony of E. R. Blinn.)

Q. Do these books include the unhappy year of 1929?

A. Yes, they include 1929 and 1930, I think they go from 1924 to 1931.

Mr. Emigh: That is the period covered by this Company as it existed then.

The Court: You may show the books to Counsel for the Government and at this time I will take a ten minute recess.

April 29, 1952, 2:45 o'clock p.m.

The Court: The Court is satisfied that a proper foundation has not been laid in regard to the books. In addition to the fact that it is so remote in time that it cannot have any bearing on the question presented here, being practically 10 years prior to any time mentioned in this case.

Mr. Emigh: May I identify this, which we deem [376] material for the record. We propose to offer this in evidence so that the record will disclose what we are talking about, and I will call Mr. Newland.

JOHN N. NEWLAND

Recalled as a witness for the defendant, having heretofore been duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): Mr. Newland have you examined the records of the North Idaho Sales Company for the years 1945 and 1946 as to the re-

(Testimony of John N. Newland.)

ceipts from phonographs and other coin operated machines and for the gross receipts?

A. Yes, sir.

Q. That included all of the receipts?

A. I have examined the records; what do you mean by "including all of the receipts".

Q. Of the North Idaho Sales Company for that period? A. Yes, sir, I have.

Q. Have you made a listing of them, your conclusions after the examination? A. Yes, sir.

Q. Do you have a statement there of it.

A. Yes, sir. [377]

Mr. Patten: I shall object, the books are not in evidence and the books are the best evidence.

The Court: Is that the exhibit that you propose?

Mr. Emigh: Yes, in connection with the examination of the books.

Mr. Patten: My objection is general, it is that the books are in their possession and when we made a computation they had the books to check our exhibits.

The Court: You may have this witness testify from all of the records in Court and if there were other records that he compiled this tabulation from, they should be here also.

Mr. Emigh: Do you have—let me ask this question.

Q. Do you have those records in Court?

A. Not in Court but they are available.

The Court: You may make your offer of proof if you care to Mr. Emigh.

(In the absence of the jury.)

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(Testimony of John N. Newland.)

Mr. Emigh: I would like to have each book marked a separate number, I am not sure what the numbers would be.

The Clerk: 56 and 57.

Q. Will you take the first numbered exhibit, is that the book which you found in the basement—strike that please—let me ask you Mr. Newland, is the book which you have in your hand one of the books which you found in the basement of the old office of the Pentulana Company which you testified that in your opinion is a genuine record of that company operated back in the years mentioned, over the period from 1924 I believe you said to 1931?

The Court: Are you in possession of those records—Mr. Emigh, let me ask you, will you state what you intend to prove now in the absence of the jury?

Mr. Emigh: To make my position clear I was asking the questions, I understood that the Court was having the record made.

The Court: I have a rule on that and I suggest you make a statement as to what you intend to prove by these exhibits. If you will make your statement into the record then the Court will see what you have in mind.

Mr. Emigh: We intend to prove the exhibit which we have now had identified, which were found by the witness under the circumstances detailed by him. This Exhibit Number 56 and the other Number 57 and we intend to prove in the

(Testimony of John N. Newland.)

years 1927 and 1928 a considerable amount of stock —we have the compilation made from these books.

The Court: Just tell us what you expect to prove.

Mr. Emigh: In the years, these two years that Mr. McFee bought and sold stock and after investments and after sales made in 1928 he had $12,000.00 and some odd dollars.

The Court: What page of the record do you expect to show this from?

Mr. Emigh: We offer the exhibit in evidence it is [379] confined to the years 1927 and 1928 and possibly early in 1929.

Q. What page or pages of the two books from which this information is obtainable, can you tell us that?

A. I don't have a listing of the pages but I do have the dates.

The Court: You may give me the dates, you are assisting counsel by doing that.

A. December 8, 1927; January 25, 1928; January 26, 1928; January 27, 1928; February 16, 1928; March 16, 1928; March 17, 1928; May 2, 1928; July 10, 1928; February 27, 1929; February 28, 1929; March 6, 1929; March 14, 1929; March 18, 1929; February 14, 1928; February 15, 1928; July 10, 1928; and October 1, 1928.

The Court: The offer of proof will be denied, the ruling of the Court will be restated at this time, if you can connect this matter up with anyone who can testify as to the correctness of this record,

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(Testimony of John N. Newland.)

in other words, anyone that has knowledge of these transactions. If you have a witness that has knowledge of these transactions so that they can be properly identified then perhaps this would be admissible.

Mr. Emigh: May I most respectfully make a suggestion to the Court?

The Court: Yes, indeed you may.

Mr. Emigh: Is it possible that the ancient documents rule has not been considered by the Court?

The Court: It is possible that I have overlooked that and I would like to have any authorities that you may have on the question any authorities that you care to submit. We will recess at this time until 10 o'clock tomorrow morning.

April 30, 1952, 10:00 o'clock a.m.

The Court: I advised counsel before the adjournment that I would reconsider the offer of proof on the part of the defendant. I suggested that if counsel for defendant had any authorities they should furnish them to the Court. I have looked into the matter very carefully myself and it is very apparent that the witness, in fact neither witness who was placed on the stand to make this proof have any personal knowledge in connection with the dealings as is said to be shown on the books. It is apparent that these entries were made some 16 years before the time of the present charge in this indictment and it is also apparent that the defendant has witnesses or at least one witness who has

(Testimony of John N. Newland.)

personal knowledge of this transaction. I don't think that we can prove book entries by going in through the back door, even if it was material. If it is material the party is here and in a position to testify. In this case the court knows that one of the parties mentioned is here [381] and should know how the entries concern the present case. I will follow the ruling that I made yesterday and refused the offer of proof.

(Remarks of Court and counsel reported but not transcribed.)

(The following had in the presence of the jury, Mr. Newland recalled.)

Q. Yesterday you were questioned as to a computation that you prepared from the books of the North Idaho Sales Company as to the gross income for the years 1942 to 1946? A. Yes, I was.

Q. Do you have the books with you there, the books from which this computation was prepared?

A. Yes, sir.

Q. Have you the computaton, I believe it is Exhibit 55? A. Yes.

Mr. Emigh: I will ask that it be shown to counsel.

Mr. Patten: May I ask the purpose of this exhibit?

Mr. Emigh: It is to clarify the evidence like any other evidence in this case; to establish facts as shown by the books—it is to clarify the books as they existed.

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(Testimony of John N. Newland.)

Mr. Patten: If this is introduced to establish the validity of these figures I object to it now. You have had some eight or nine witnesses that have testified here as to contents in exhibits similar to Exhibit 39 we have had none of the exhibits. If it is for the purpose of showing what is in some other book or books we shall object to it. [382]

Mr. Emigh: It is offered to show what the books reflect.

Mr. Patten: It says slot machines. I listened to witnesses tell what was in books such as Exhibit Number 39, now if it is to show the correctness of those figures I shall object.

The Court: In other words, he has no objection to the admission to that exhibit as showing what the books show without admitting the correctness of it.

Mr. Patten: I will take your word that those are the figures, but if those figures are for the purpose of showing what is in the book but if it is to show the correctness then I object.

Mr. Emigh: It is for the purpose of showing what is in the books.

The Court: It may be admitted for that purpose only.

Q. Is that a correct computation of the items purported to be shown on it and as shown in the books of the North Idaho Sales Company?

A. Yes, sir.

Q. Will you read the items that appear there

(Testimony of John N. Newland.)

for the respective years and the total, or the gross income?

A. The year 1942, slot machines commissions $169,307.89; phonograph commissions, $30,186.86, total $199,494.75. For the year 1943 slot machine commissions $173,144.48, phonograph commissions, $38,969.08, total $212,133.56. [383] For the year 1944 slot machine commissions $140,405.95, phonograph commissions $54,761.18, total $195,167.13. For the years 1945 slot machine commissions $191,446.83, phonograph commissions $47,865.97, total $239,-312.80. For the year 1946 slot machine commissions $246,469.77, phonograph commissions $50,-209.91, total $296,679.68.

Mr. Emigh: I think that is all, you may examine.

Cross-Examination

Q. (By Mr. Patten): How long have you been associated in this case?

A. I think about 18 months.

Q. You have had Mr. McFee's books all of that time? A. No, sir, we haven't.

Q How long have you had McFee's books?

A. Upon occasions, not for long periods of time.

Mr. Patten: May I use the blackboard in the cross-examination of this witness?

The Court: Yes, you may do that.

Q. Taking this exhibit, from 1942 to 1946 the list pertaining to slot machines as you read them in the column on the left hand side. The first figure is 1942.

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(Testimony of John N. Newland.)

A. The commissions amount to $169,307.89.

Q. That is slot machine commissions?

A. Yes, sir. [383]

Q. And the year 1943 and on through 1946?

A. $173,144.48; $140,405.95; $191,446.83; $246,-469.77.

Q. Now, just make the figures small on the left to keep this straight. You have Exhibit Number 6?

A. Yes, sir.

Q. Will you find on there how much tax Mr. McFee paid on the slot machines in 1942?

A. The taxes that he paid on the slot machines?

Q. Yes, that is the license fees on slot machines, it is listed under taxes, I think the figure is about $18,000.00. A. What is the question.

Q. The figure that is shown on the return on coin operated machines, the tax?

A. $18,443.30.

Q. Now will you write that on a piece of paper?

Mr. Emigh: I think, if it please the Court, this is improper cross-examination. This is a matter that was not gone into on direct examination, he testified from items on the books. If he wants to make him a Government witness that is different.

The Court: The answer may stand.

Q. If Mr. McFee had four slot machines to one juke box on each operation and the annual tax on the slot machines is $100.00 and the tax on each juke box is $10.00, how many slot machines would Mr. McFee have in 1942?

Mr. Emigh: We object to that as not based on

(Testimony of John N. Newland.)

evidence [384] from which the witness is testifying nor evidence in the record. It is speculative and it is a hypothetical question and not proper cross-examination.

The Court: You put him on the stand as an expert.

Mr. Emigh: To identify certain figures and nothing else; he did identify them and his examination was on those figures, I think it is not proper to examine outside of the questions put on direct examination. If counsel proposes a hypothetical question it does not take in the evidence in the record and is wholly improper as cross-examination.

The Court: It is quite questionable in my mind whether I should have admitted the testimony in the first place, however, I did admit it and now I will permit the Government to examine in every particular in regard to it. He may answer.

A. The license on slot machines is how much.

Q. $100.00.

A. You are guessing how many machines in each location?

Q. I am taking the figure of four slot machines to one juke box.

A. The juke box license is how much?

Q. $10.00. A. I see.

Q. Will you compute how many slot machines tax were paid in 1942, that is taxes on how many slot machines?

A. You say that each location has four slot machines and one juke box? [385]

Q. Four slots and one juke box.

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(Testimony of John N. Newland.)

A. You don't want it to the penny?

Q. No, not that close.

A. 45 locations and apparently four slot machines in each location would be 180 machines, 180 times 100 would be $18,000.00, one juke box in each location, 45, 45 times 10, I can get within $6.40 is that close enough?

Q. How many slot machines does that indicate?

A. 180 slot machines.

Q. Will you put that right by 1942.

A. Yes.

Q. Now, you have been handed Exhibit Number 7, what is the figure of taxes paid on coin operated machines for the year 1943 according to that exhibit which is Number 7. A. $38,107.02.

Q. Will you make a similar computation on that year? A. I have it.

Q. And what figure do you arrive at?

A. 372.

Q. Will you put that on the blackboard. Now, you have been handed Exhibit Number 5, do you find the figure on the taxes paid for that year which is 1944 on the coin operated machines?

A. $50,772.46.

Q. Will you make a similar computation and tell us figure you arrive at? [386]

A. 496.

Q. Will you put that figure opposite the year 1944. You have been handed Exhibit Number 1, will you read to the jury the tax paid on coin operated machines for that year, which is 1945?

(Testimony of John N. Newland.)

A. $48,906.36.

Q. Will you make a similar computation?

A. I have it.

Q. What figure do you arrive at? A. 480.

Q. Now you have that figure on the blackboard would you take Exhibit Number 2 and do the same thing and tell us what figure you arrive at?

A. 556.

Q. Do you have the depreciation record and schedules with you of the North Idaho Sales Company?

A. The schedules would be in the tax returns.

Q. With a smaller figure will you take the returns and put the net income of the North Idaho Sales Company on that side (indicating)?

A. I don't understand.

Q. The net income for the years 1942, 1943, '44, '45 and '46? A. Where do I get it from?

Q. From the tax returns—did they agree with the books?

A. It has been testified that they do.

Q. You can get it from the tax returns, the net income from [387] the business.

A. 1942, $126,107.69; in 1943, $106,396.62; in 1944, $15,582.27; in 1945, $48,644.44——

Mr. Emigh: May I ask counsel if it his intention to impeach the bill of particulars?

Mr. Patten: Only to establish the facts as alleged in the indictment.

Mr. Emigh: You set out in the bill of particu-

(Testimony of John N. Newland.)

lars that the income tax returns and the books coincided.

Mr. Patten: We agreed to that.

Mr. Emigh: This is not to impeach the books in that respect.

Mr. Patten: It is not for that purpose.

Q. Now what about 1946?

A. 1946, $82,873.12.

Q. From the records that you produced can you tell me how many new slot machines Mr. McFee purchased in 1942?

A. Could I tell how many?

Q. Yes, how much of his funds he spent for slot machines in 1942?

A. Where do I get the figure from?

Q. Well you have the tax returns and it shows the depreciation does it not?

A. Do you want the amount spent?

Q. Yes, the amount spent.

A Are you going to ask for the other years also? [388]

Q. Yes I am.

A. Then I will get it now while I am getting the figure for 1942.

Q. Very well and can you put it in the proper year on the blackboard?

A. 1942, $39,924.22; 1943, $5,763.23; 1944, $16,932.95; 1945, $3,510.90; 1946, $35,049.20.

Q. You examined the books, can you tell what the average cost of slot machines are, roughly?

A. I don't know.

(Testimony of John N. Newland.)

Q. He purchased a great many slot machines?

A. I gave my answer on that.

Q. And what is that?

A. I have no objection to answering the question but I don't know.

Q. He purchased a lot of machines?

A. It shows what he bought.

Mr. Emigh: We object to this examination, the witness was not examined on this matter on direct examination.

The Court: If it does not show on the books the objection is sustained.

Q. Assuming Mr. Newland that a slot machine cost $300.00——

Mr. Emigh: We object to a hypothetical question not based on the evidence and the record in the books.

Mr. Patten: The price or rather the purchase of slot machines is shown in the cancelled checks.

The Court: If they are in the books, but if the books don't show the average cost of slot machines and if you say it is not in the books then you can't answer the question.

A. May I explain, the average cost of slot machines means nothing in auditing a set of books, when I am auditing, the average cost means nothing.

The Court: But if it is in the books, you may inquire about that.

Q. Is it?

A. The average cost of any machine?

(Testimony of John N. Newland.)

Q. Have you seen an entry of one machine?

The Court: This man is an expert and it seems to me if it is not there he can say so.

A. I have said no.

Q. Assuming, Mr. Newland $300.00 as the cost of a machine, will you figure out how many machines were purchased?

Mr. Emigh: We object to assuming any specific cost as not being in the record, if he is basing a hypothetical question it is on a figment on the imagination and I object to it.

The Court: If it is in the books of course it could be determined and he might testify, if it is not then of course there is nothing to base this on.

Q. Will you take each year and explain the history of the North Idaho Sales Company, the receipts from machines, how many machines there were and the net profit from the business and [390] they spent for new machines, buying machines?

A. Yes, in 1942 the commissions from slot machines to the North Idaho Sales Company totaled $169,307.89; that is the gross and out of that you must take the expenses on that, during the year, based on the assumption of the number of slot machines in each location and so forth. The number of machines according to the license tax paid would be 180 so he would have 180 machines.

Q. That is on the basis that I asked you to consider. A. Yes, sir.

Q. And the net profit on those machines for the year was $125,107.69? A. Yes.

(Testimony of John N. Newland.)

Q. And he purchased $39,924.22 in new equipment, new machines? A. Yes.

Q. Now will you give that information on other years?

A. 1943, gross income $173,144.48; there were 372 machines on the same basis, the net income as shown, $106,396.62 and he paid $5,763.23 for new equipment.

Q. And for the year 1944?

A. Gross $140,405.95—496 machines, $15,582.27 net income and purchased in machines $16,932.95.

Q. Now the next year?

A. Now, for the year 1945 this gross income was $191,446.83; he had 480 machines, the net profit was $48,644.44 and he purchased $3,510.90 in new machines. The next year [391] the gross income was $246,469.77, he had 556 machines, the net profit was $82,873.12, the purchase of equipment amounted to $35,049.20.

Mr. Patten: I think that is all.

Redirect Examination

Q. (By Mr. Emigh): Those figures that you have given are based on the assumption that Mr. Patten gave as to the number of machines?

A. Yes, that is an assumption but the rest is right.

Q. You are not basing the number of machines from the books?

A. No, because the ledger does not show that, I have not seen any record of the number of ma-

(Testimony of John N. Newland.)

chines, it may be that there is such a record but I do not know of it.

Q. If the assumption of the number of machines and the amounts in relation to the gross income is not correct, then the conclusion is not correct?

A. No, the accuracy of the statement would depend on the conclusion or the other way.

Q. It is based upon facts set forth in the question of the attorney and not on the facts appearing in these records?

A. That is right.

Mr. Emigh: That is all.

Recross-Examination [392]

Q. (By Mr. Patten): If my assumptions are correct then the results are correct?

A. Yes, I would say they would be.

Mr. Patten: That is all.

Mr. Emigh: That is all.

RUTH POSKA

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Purdy): You may state your name?

A. Ruth Poska.

Q. Where do you reside?

A. Lincoln, Nebraska.

Q. Where did you reside in the year 1944?

(Testimony of Ruth Poska.)

A. Wallace, Idaho.

Q. Are you acquainted with the defendant, A. F. McFee? A. Yes, sir.

Q. Were you employed by Mr. McFee in that year? A. Yes, sir.

Q. How long did you continue to be employed by Mr. McFee? A. Six years.

Q. What were your duties?

A. To begin with I did general office work and then I became [393] his bookkeeper in 1945.

Q. You were in charge of the books and records of the North Idaho Sales Company?

A. Yes, sir.

Q. Did you have access to the safe?

A. Yes, sir.

Q. I will ask you if, during the year 1945, there was a considerable sum of money in the safe that was Mr. McFee's personal money?

A. Yes, there was.

Q. I will ask you whether or not that money that was in the safe was in any way connected with the operation of the business of the North Idaho Sales Company? A. No.

Q. Mrs. Poska did you at any time pay money to the Dan Mac Lease? A. Yes, sir.

Q. Which lease did you pay on?

A. The Dan Mac Lease.

Q. Did you take money for the payment you made on the Dan Mac Lease from the funds of the North Idaho Sales Company or the funds of Mr. McFee?

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(Testimony of Ruth Poska.)

A. Those were from Mr. McFee's private funds.

Q. Under Mr. McFee's direction was it?

A. Yes, sir.

Q. Was that money in the safe at the time you came to the [394] employment of Mr. McFee?

A. Yes, it was.

Q. Do you know the amount of money in that safe that was his, that was Mr. McFee's.

A. No, sir.

Q. After you made all of the payments, after you paid all of the payrolls to the Dan Mac Lease and any matters in connection with that was there money still left in that safe, in Mr. McFee's money?

A. Yes, sir.

Q. Did you advise the Government of those facts as you have stated? A. Yes, sir.

Q. Did you give them a statement such as you have testified to here in substance?

A. Yes, sir.

Q. Do you recall how much money you paid on the Dan Mac Lease? A. Not definitely.

Q. Approximately?

A. It must have been close to $50,000.00, I don't know for sure.

Q. It must have been close to that?

A. It must have been approximately $50,000.00.

Mr. Purdy: You may inquire.

Cross-Examination [395]

Q. (By Mr. Patten): Mrs. Poska who was working at the North Idaho Sales Company when you

(Testimony of Ruth Poska.)

started there? A. The bookkeeper you mean?

Q. Yes.

A. Helen Kenear.

Q. When did she leave?

A. October 15, 1945.

Q. Was that the first time you had access to the safe? A. Yes, sir.

Q. When was the first time that you saw those funds?

A. Well, I cannot say for certain, I used money for the Dan Mac Lease before Miss Kenear left but I didn't get it out of the safe, she got it out for me.

Q. So, at some time in November of 1945 was the first time that you saw this money?

A. Yes, or maybe in October.

Q. To the best of your knowledge will you tell the jury about how much money there was in the envelope and how was it there, in what denominations?

A. Yes, I recall it was a manila envelope, I don't know how much there was in it but a great deal of money, I didn't count it.

Q. Did any one else have access to that safe besides you? A. Only McFee.

Q. At the end of 1946 was there some money still left there? A. Yes, sir. [396]

Q. A good bit of money left there at that time?

A. I would say quite a lot of money.

Q. In picking up the envelope, was it light or heavy, I am not trying to confuse you, I only want the facts.

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(Testimony of Ruth Poska.)

A. I actually can't remember but it seems that there was a great deal of money.

Q. Do you know of your personal knowledge that Mr. McFee did not put the money in that safe in 1945 or 1944?

A. Not to my knowledge.

Q. He could have put the money in there?

A. Yes, he could have.

Q. When you say this money wasn't related to the business of the North Idaho Sales Company, do you know where this money came from?

A. No, I didn't know.

Q. Isn't it a fact that you just know that it didn't get on the books, didn't get deposited in the bank, or wasn't reported in the books?

A. That is right.

Q. You didn't know where it came from?

A. No, I didn't.

Q. It could have come out of the slot machines couldn't it?

Mr. Purdy: We object to this, she said that she didn't know.

Mr. Patten: I will withdraw that question.

Q. You say that you didn't and don't know where it came from? [397]

A. That is right.

Q. Are you very familiar with this record (indicating)? A. Yes.

Q. You have used a lot of those? A. Yes.

Q. Didn't you receive them from the operations——

(Testimony of Ruth Poska.)

Mr. Purdy: I object to that as not proper cross-examination, it is not related to the direct examination in any way this matter not having been gone into on direct examination and it has been covered by numerous other witnesses, this witness did not testify to the matter at all.

The Court: She may answer.

Q. Let me ask this, you received the records from all of Mr. McFee's operations? A. Yes.

Q. And what did you do with them after you received them?

Mr. Emigh: May that objection go to this examination on the ground that it is not proper cross-examination, that it is irrelevant, immaterial and incompetent and does not relate to matters testified to by this witness on direct examination.

The Court: I am not sure that I understand the purpose of this examination.

Mr. Patten: I am proving, or attempting to prove that she had no basis of knowing——

Mr. Emigh: ——Now we challenge that statement, the record shows that this money was in the office. [398]

The Court: As I understand it she has testified that she didn't see this money until October of 1945, she never knew about the money prior to that time. I will permit the cross-examination.

Q. What did you do with this record that you got from these operations?

A. I checked those with the bank deposit slips and each had to be reconciled with the books.

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(Testimony of Ruth Poska.)

Q. What did you do with the books then?

A. When I completely checked those books I turned them to Mr. McFee.

Q. Have you seen them since that time?

A. No, sir.

Q. Did the Government Agents ask for those books? A. I believe so, yes sir.

Mr. Patten: That is all.

Mr. Purdy: No further questions.

CHARLES GROSSCIRTH

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): Where do you reside Mr. Grosscirth? [399]

A. St. Ignatius, Montana.

Q. Your occupation or business?

A. I am a business man and rancher.

Q. What does your ranch consist of?

A. Livestock.

Q. How many acres of land?

A. 6,000 acres.

Q. And how much livestock on that ranch?

A. 450 head.

Q. Do you have any mills or other operations?

A. Yes, at Ronan——

Q. ——Do you have any other business enterprises? A. Yes.

Q. Where are those located?

(Testimony of Charles Grosscirth.)

A. Kansas and Illinois.

Q. What are they? A. Grain elevators.

Q. Any other business?

A. I am interested in a distillery in Anchorage, Kentucky.

Q. Are you acquainted with Mr. A. F. McFee, the defendant in this proceeding? A. Yes, sir.

Q. When did you first meet him?

A. In Havana in 1929.

Q. Were you in business in Havana in 1929?

A. Yes. [400]

Q. In what business were you engaged?

A. Distilling.

Q. Did you have any business transactions with Mr. McFee? A. Yes, sir.

Q. Was that just a small business transaction or was it a large quantity transaction?

A. Well there was more than one, I would say that they were considered large quantity.

Q. What part of the year 1929 did you meet Mr. McFee? A. In the summer of 1929.

Q. Was Mr. McFee residing in that part of the country?

A. He was residing in New Orleans.

Q. How did the business transactions continue with Mr. McFee?

A. Until the spring of 1932.

Q. Can you give an estimate of the amount of business, approximately, in dollars and cents that was transacted between yourself and McFee?

A. From 1929 until I stopped doing business

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(Testimony of Charles Grosscirth.)

with him I would say $100,000, more or less.

Q. Do you recall an occasion when Mr. McFee purchased 2,000 cases of whiskey at one order?

A. I would say that he purchased as much as 8,000 or 9,000 cases but I don't recall any one specific order for 2,000 cases.

Q. Those were cash purchases?

A. Cash and some credit; I extended some credit but it was [401] short term credit.

Q. Mr. McFee owes you nothing at the present time in regard to those transactions?

A. No, sir.

Mr. Emigh: You may cross-examine.

Cross-Examination

Q. (By Mr. Patten): When did the business transactions cease with Mr. McFee?

A. In 1932.

Q. Why did they cease?

A. I think Mr. McFee was convicted and sent to prison.

Q. Was this an illegal transaction?

A. No, Mr. McFee bought the liquor in Cuba and we shipped it to Guatamala and it was perfectly legal.

Q. From your side? A. Yes, sir.

Q. You have no idea what Mr. McFee did with the liquor later? A. No.

Q. Do you know whether these funds with which he purchased the liquor were personal funds of Mr. McFee's?

(Testimony of Charles Grosscirth.)

A. I do not, but I know that he paid for it, I assume they were.

Q. Wasn't it a fact that these funds might have belonged to some one else? [402]

A. I wouldn't know.

Q. How were they handled in cash or in currency?

A. Some in cash and some in cashier's checks.

Q. You are talking about the $100,000.00 gross business over a period of time? A. Yes.

Q. How much did he buy in a single trip?

A. I believe remember one of about 1500 cases.

Q. How much would that involve?

A. It would involve at that price, about $37,500.00.

Q. Isn't it a fact that from 1929 to 1932 Mr. McFee acted as a salesman for the W. D. K. Distillers of Vancouver, British Columbia?

A. I don't know.

Q. Isn't it a fact that he was employed by this company at some three hundred a month?

A. I don't know.

Q. And this money could have belonged to the W. D. K. Distillery Company of Vancouver?

A. I wouldn't know.

Q. But he could have been a salesman for this distillery company? A. I wouldn't know.

Mr. Patten: That is all.

Redirect Examination [403]

Q. (By Mr. Emigh): Your transaction with

(Testimony of Charles Grosscirth.)

him was as an individual? A. That is correct.

Mr. Emigh: That is all.

Mr. Patten: That is all.

The Court: We will take a recess for 15 minutes at this time.

April 30, 1952, 11:20 o'clock a.m.

Mr. Patten: I would like to have Mr. Newland recalled for one question.

The Court: You may do that, Mr. Newland will you take the stand?

JOHN M. NEWLAND

A witness for the defendant, having heretofore been duly sworn, recalled for cross-examination.

Cross-Examination

Q. (By Mr. Patten): Mr. Newland, I would like to correct the first assumption you took in the year 1942 assume the tax is $50.00 and correct that figure?

A. Then that would be 360. [404]

Mr. Patten: That is all.

CHARLES GROSSCIRTH

A witness having heretofore been called by the defendant, and having been duly sworn, recalled.

Redirect Examination

Q. (By Mr. Purdy): Referring to the year

(Testimony of Charles Grosscirth.)

1935, did you have any business transactions with Mr. McFee? A. Yes.

Q. Do you recall the amount of business you had with him, that is, in money?

A. Approximately around $5,000.00.

Q. Going back to the year 1929 to 1931 I will ask you if you were acquainted with Mr. Smith, Moore Smith?

A. I knew him at a later date.

Q. Do you know whether Mr. McFee sold to Mr. Moore Smith 2,000 cases of whiskey?

A. No, I don't.

Q. Do you know whether Mr. McFee sold him any whiskey? A. No, I don't.

Mr. Purdy: That is all.

Mr. Patten: No questions.

RICHARD FIELDS [405]

Being recalled as a witness for the defendant, having heretofore been duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): In connection with the operation of slot machines does the owner of the machines or did the owner in 1943 or the location buy the license or was it the operator?

A. The operator bought the license.

Q. And in whose name was the license?

A. In the name of the location, owner.

Q. Each time the ownership of the location changed would it be required that a new license

(Testimony of Richard Fields.)

be obtained? A. Yes, absolutely.

Q. And would you say that these location ownerships or the owner of the location changed frequently?

A. Yes, in some cases quite frequently.

Mr. Emigh: You may inquire.

Cross-Examination

Mr. Patten: No questions.

Mr. Emigh: May the record show that the defense rests.

The Court: At this time we will recess until 2:00 o'clock. [406]

April 30, 1952, 2:00 o'clock p.m.

H. R. McINTYRE

Recalled in rebuttal as a witness by the plaintiff, having heretofore been duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Patten): I believe that at the time you previously testified you told the jury that you had been a Revenue Agent for 30 years and here since 1924? A. Since 1926.

Q. You have been handed Exhibit marked 53 and also Plaintiff's Exhibits 1 and 2 and 5, would you explain to the jury what effect Plaintiff's Exhibit 53 has on the documents shown to you as 1, 2 and 5?

Mr. Emigh: We object to that as not proper re-

(Testimony of H. R. McIntyre.)

buttal, it does not tend to rebut anything offered by the defendant. The exhibit speaks for itself.

The Court: He may answer.

A. This reflects an overpayment.

Q. Will you identify the document?

A. It is a communication from P. H. Sherwood, Head of the Division, this reflects an over payment in the 1944 [407] income estimate of $25,879.94.

Q. For what year? A. 1944.

Q. When was the estimate filed on which these payments were made?

A. Will you state that question?

Q. Yes, when were the estimates filed?

A. You mean the date of payment?

Q. The date the estimate was filed?

A. It does not show.

Q. When were the payments made?

A. On May 17, 1944, $18,464.00; June 20, 1944, $13,686.00; September 15, 1944, $3,071.28.

Q. Does the Sherwood indicate that the Collector sent Mr. McFee a check for any amount of money?

Mr. Emigh: We object that, the letter speaks for itself.

The Court: He may answer.

A. It reflects an over payment but does not necessarily indicate that he received a check.

Q. Will you refer to Exhibits 1 to 9 and by reference to 1 to 9, how much did Mr. McFee pay to the Collector's office in 1945?

Mr. Emigh: Objected to as not proper rebuttal, the matter was gone into in the case in chief.

(Testimony of H. R. McIntyre.)

The Court: The question seems to be how this large [408] check was handled, whether it was in cash or whether he was given credit for it.

Q. Will you tell us what happened on the books of the Collector's office?

Mr. Emigh: Objected as it doesn't show the nature of the payment.

The Court: It must be connected with this check.

A. Yes, he received credit for that overpayment on subsequent years income returns.

Q. How much tax did he owe for 1945 as shown by the tax return?

The Court: The question is whether it was given to him in cash or credit if this witness can testify to that he may answer.

A. He received credit for that over payment on his 1945 income tax return up to the amount of $10,021.05.

Q. How much credit on the 1946 tax?

A. $15,858.89.

Q. Did the collector ever make payment of the $25,879.94 to Mr. McFee? A. No, sir.

Q. How was this credit used up?

A. By applying it to subsequent years income tax liability.

Mr. Patten: You may examine.

Cross-Examination [409]

Q. (By Mr. Purdy): He over-estimated and got credit for it in following years? A. Yes, sir.

Mr. Purdy: That is all.

Mr. Patten: That is all.

CHARLES J. SEYMOUR

Called as a witness for the plaintiff, in rebuttal after being first duly sworn, testifies as follows.

Direct Examination

Q. (By Mr. Patten): What is your address, Mr. Seymour?

A. 401 Park Drive, Coeur d' Alene.

Q. How long have you lived in Coeur d' Alene?

A. Since 1906.

Q. Your business?

A. My occupation is Secretary of the Fraternal Order of Eagles.

Q. How long have you held that office?

A. Since 1927.

Q. Does the Eagles Lodge have slot machines?

A. Yes, sir.

Q. And did they have slot machines in 1945 and 1946? A. Yes, they did.

Q. Do you keep a record of the receipts from those slot machines?

Mr. Emigh: Objected to as incompetent, irrelevant and [410] immaterial and no proper foundation to go into this evidence, there is no connection between this and the defendant McFee. It is immaterial whether they kept a record of the receipts or not, this is incompetent and before evidence of this kind is admitted there must be a foundation.

The Court: You have not permitted him to lay a foundation as yet. I am satisfied there is no foundation laid.

Q. Did you have slot machines in your club in

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(Testimony of Charles J. Seymour.)

1945 and 1946?

A. We did.

Q. Where is your club located?

A. 209 Sherman Avenue, Coeur d' Alene.

Q. Are these slot machines set tight or loose?

Mr. Emigh: We object to that, it is a very relative term and does not establish that they were of the same character as used in the places referred to in the testimony given in this case. It is immaterial how they set their slot machines and this does not lay a foundation as to any evidence that should go in here, there is not foundation laid for comparative testimony as to the places in which Mr. McFee had slot machines. This being a fraternal there is no similarity so that the jury may use this as comparative evidence.

The Court: There was some testimony about tight or loose machines I think the witness here, I have forgotten the name, testified as to the tight or loose machines at some of these locations. He may answer with the understanding that [411] it will be stricken if it is not connected up.

Mr. Patten: May I discuss this testimony with the Court?

The Court: Yes, you may.

Mr. Emigh: We object to this and suggest that the jury be excused.

The Court: I will hear you.

Mr. Patten: I understood that counsel for the defense stated that the receipts were correctly reflected in the books here. I am attempting to establish the number of machines he had and I am estab-

(Testimony of Charles J. Seymour.)

lishing what the slot machines took in in 1945 and 1946 and I am going to show by this witness what slot machines took in within two or three blocks of the place operated by the defendant.

Mr. Emigh: None of the slot machines testified to here according to the evidence were in any place similar to the place testified to by this witness. The machines in question here in this case, the testimony shows, are scattered all over the county in fact outside of this county and there are no receipts identified from machines in Coeur d' Alene. The testimony is such that no comparative testimony can establish anything.

Mr. Patten: My understanding is that the Foresters Club was a fraternal organization.

The Court: I believe he may answer.

Q. You did keep track of the receipts in 1945 and '46? [412] A. Yes.

Q. Do you have that record? A. Yes.

Mr. Emigh: May this evidence of this witness in relation to the receipts of the slot machines or from the slot machines in the Eagles hall go in under my objection which the Court has overruled as the foundation has not been laid and it is not fair comparative testimony and on the ground that there is no evidence that Mr. McFee had any interest in these machines; no evidence that McFee had any machines in any fraternal organization; there is no evidence that the patronage or the number of patrons was the same or can be compared.

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(Testimony of Charles J. Seymour.)

The Court: Do you expect to connect this up with McFee?

Mr. Patten: No, except that they were like slot machines.

The Court: I will sustain the objection.

Mr. Patten: That is all of this witness. We have a subpoena for a witness from Wallace, he is a banker and I understand that he is on his way.

The Court: We will recess at this time until 3:30 o'clock.

April 30, 1952, 3:30 o'clock p.m. [413]

Mr. Patten: I determined that the witness whom we had subpoenaed has just left Wallace and in the interest of time we have entered into a stipulation that we may admit this exhibit as being the account of A. F. McFee, it may be admitted as Exhibit Number 58.

Mr. Emigh: We so stipulate.

The Court: It may be admitted and so stipulated.

Mr. Patten: The Government rests.

Mr. Emigh: The defense rests. I have submitted a motion to the Court, it is similar to the motion submitted at the close of the plaintiff's evidence.

The Court: Do you have anything to add?

Mr. Emigh: Yes; the present state of the record includes evidence which tends to weaken the evidence of the Government by way of explanation for some considerable amount of funds and I will submit it on the argument made before.

The Court: The motion will be denied.

The Court: If it is the desire and a record is made the motions filed with the Clerk may be transcribed and made a part of the record. The record may also show that counsel are requested to come to Chambers and go over the proposed instructions with the Court, and at this time I will adjourn until tomorrow morning. [414]

May 1, 1952, 10:00 o'clock a.m.

The Court: I will limit the argument to one hour and fifteen minutes on a side. I will set the lunch hour for 1:00 o'clock and we will submit this case to the jury before lunch.

(Argument of counsel.)

(Instructions of the Court.)

The Court: Ladies and Gentlemen of the jury, this is a very important case, our income tax law and the duty of every citizen to obey it is very essential to the welfare of our nation. I doubt if a more important case than the one you are called upon to decide has ever been presented to a jury during my time as Judge of this Court.

I feel that you will be very careful to see that there is no miscarriage of justice in the verdict that you will soon be called upon to return to this Court.

Before you were called here to serve as trial jurors in this case a Grand Jury had returned an indictment against the defendant charging him with the commission of a crime; the offense generally known as "income tax evasion".

The offense or charge is set forth in the indict-

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ment in two counts, which have been explained to you in the statements of counsel. The indictment was read to you at the beginning of the trial by the Clerk, and as stated by the Clerk, the [415] defendant has heretofore entered his plea of not guilty, which means that he denies the charge or charges in the indictment.

Now, I want to caution you at the outset that the indictment is in itself no proof of guilt. It is a mere formal accusation made by the Government against the defendant charging him with the commission of an offense. The Government thus advises him in advance of his trial of the issues he must meet in order that he might prepare his defense. You will understand that he is not to be prejudiced, nor are you to be influenced by the fact that he had been indicted and you will not consider the indictment as evidence in any manner.

You are instructed that the gist of the offense charged in this indictment is a wilful attempt on the part of the defendant Austin F. McFee to evade or defeat the tax for the years 1945 and 1946 imposed by the income tax laws. The statute, in its pertinent portions, provides: "Any person * * * who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall in addition to other penalties provided by law be guilty of a felony."

The word "attempt" as used in this law, involves two elements: (1) an intent to evade or defeat the tax and (2) some act done in the furtherance of such intent.

The indictment in this case charges that the

means by which the defendant attempted to evade the income taxes imposed by law was by filing with the Collector of Internal Revenue returns which understated his income for 1945 and 1946. [416]

The word "attempts" contemplates that the defendant had knowledge and understanding that during the calendar years 1945 and 1946 he had income in addition to that which he reported on his tax returns and he attempted to evade or defeat the taxes due on this additional income by purposefully failing to report all the income he knew he received during the years 1945 and 1946.

After you were sworn you were advised by the Government through its counsel in some detail what the Government expected to prove and what the nature of the proof would be. This statement, like the indictment is not to be considered as evidence. It was made merely for the purpose of enabling you to better understand the testimony which followed. During your deliberations in this case and when you arrive at a verdict it should be upon the evidence submitted to you during the trial and upon that alone, and not on any statement of counsel.

You are the judges of the credibility of the witnesses and of the weight to be given to their testimony. That is your right and responsibility; not even the Court can deprive you of that right, or relieve you of the responsibility of the determining the facts and passing on the weight and credibility of the testimony.

In determining the weight to be given the testimony of any witness you may take into considera-

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tion his or her interest in the case; his or her candor or frankness or lack of it, and [417] also his or her qualification to know and understand the matter about which he or she may testify.

As I mentioned, it is your duty to pass upon the facts in this case; likewise, it is the duty of the Court to pass upon the law and to instruct you as to the principles of law applicable to the matter being tried. You are bound by your oaths to accept the instructions of the Court as the law in the case.

If the Court has inferred, or if you should have gathered during the trial of the case that the Court has some opinion as to the facts in this case you will disregard that entirely. The matter of the guilt or innocence of the defendant as based on the facts presented to you here is a matter for your determination and yours alone and the Court has not intended to infer at any time that he had any feeling on the matter.

When you go to your jury room, and indeed during your entire deliberations, you will bear in mind and be governed by the general rule that the defendant in this case is presumed to be innocent of the offense charged until his guilt is proved by competent evidence beyond a reasonable doubt.

The burden is therefore upon the Government to prove the defendant guilty beyond a reasonable doubt, that means that the Government has the burden of proving the material allegations of the indictment beyond a reasonable doubt. I don't want you to be misled by all the questions you were asked

when you were qualified as to reasonable doubt, nor by argument of Counsel.

You will note that the phrase is "reasonable doubt". It [418] is just such a doubt as the term implies and is a doubt for which you can give a reason. It means a doubt which is reasonable in view of all the evidence. A doubt growing out of the testimony in the case, or the lack of testimony.

I may say generally; if after you have fairly considered all the evidence, with a sincere desire and reasonable effort to reach a conclusion, you can candidly say that you are not satisfied of the defendant's guilt, then you have a reasonable doubt, and of course, you should acquit the defendant. But upon the other hand, if, after an impartial and earnest consideration of all the evidence, your minds are in such a condition that you can truthfully say that you have an abiding conviction that the charge is true, then you have no reasonable doubt and it would be your duty to convict.

Under this indictment there must be an intent on the part of the defendant to evade the payment of proper income tax. The question of intent is a matter for you, as jurors to determine, and as intent is a state of mind and it is not possible to look into a man's mind to see what went on, the only way you have for arriving at the intent of the defendant in this case is for you to take into consideration all of the facts and circumstances shown by the evidence, including the exhibits admitted in evidence, and from all such facts and circumstances you

should determine what the intent of the defendant was at the time in question here.

You are instructed that if you find substantial evidence [419] outside of the defendant's own statements consisting of increase of net worth during the taxable years or any absence of personal records or books of account or the failure of books and records to show fully its transactions or those of the defendant then this body of testimony derives support from the defendant's failure to offset or explain the discrepancy through whatever means he might do so.

I don't want to comment on the evidence but there is one outstanding matter that you are left in the dark about, I don't intend to make any inference about it, as the evidence here is solely for you. But where are the tickets that should show the receipts and division of the money taken from the slot machines for the years 1945 and 1946. There was only one of these books of tickets introduced in evidence by the defense. None of the witnesses, bookkeeper, manager or other witnesses for the defense produced these tickets and all said they had no knowledge of these tickets. The tickets were traced to the possession of defendant McFee. It seems to the Court that if the tickets balanced with the bank account that it would have been an easy matter for the defense to produce the tickets if they have not been destroyed. Why were they not produced to show the receipts of the slot machines for these years?

The burden of proof resting upon the Government does not shift during the case but when in

the trial of charges of income tax evasion discrepancies between the taxpayer's returns and his actual income are indicated by the Government's [420] proof, the failure of the defendant to offer explanation in any form may be considered by you in finding your verdict.

You are instructed that the defendant is charged with attempted evasion of his income tax for only the years 1945 and 1946. Any evidence of like or similar transactions by the defendant for other years which you may have heard is to be considered by you only insofar as you may find it bears upon or relates to the intention of the defendant with respect to tax evasion for the years of 1945 and 1946.

You are instructed that you may find from the fact that the defendant signed his individual tax returns he had knowledge of the contents of those returns.

You are instructed that if you find that there were any gains profits, or income received by the defendant which were not reported, it makes no difference as far as the question of taxability is concerned whether such income was lawfully received or unlawfully received, inasmuch as both would be taxable and should have been reported.

You are instructed that it is not necessary that the Government prove an evasion of all the tax charged in the indictment. It is sufficient if there was an attempt to evade any substantial portion of the taxes as charged in each of the two counts of the indictment.

You are instructed that the possession of money alone is not sufficient to establish net taxable income. However, evidence of the possession and the expenditure of money during [421] the years 1945 and 1946 may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income during such years.

The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly or intentionally did not report all his taxable income for the years 1945 and 1946 and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax.

Bonafide mistakes should not be treated as false returns or as a willful attempt to evade the payment of income tax; however, the duty to file the return is personal and it cannot be delegated, and no man who is able to read and write and has the mentality to understand business transactions and who signs a tax return should be allowed to escape the responsibility of good faith and ordinary diligence as to the correctness of the return which he signs, whether prepared by himself or somebody else.

You are instructed that, if you find that the defendant spent the large sums of money the Government claims he spent during the years 1945 and 1946, on the question of when he received this income you may consider whether his business as many others was the beneficiary of the prosperity

of the war and post war years. You may also consider the pattern of his expenditures. That is to say, you may consider whether his [422] expenditures appeared to be expenditures which kept pace with his earnings or whether they appeared to be expenditures which bore no relation to earnings.

You are instructed that the owner of a business need not be the actual bookkeeper to be familiar with the affairs and finances of that business. Of course, he would not be liable for innocent clerical mistakes; but he must be held to know that which it is duty to know, and it is for you to determine from all the evidence whether the defendant had knowledge of the falsity of the returns as charged in the indictment, if you find such returns were false.

The Government has attempted to establish the defendant's income for the years 1945 and 1946 by showing that he accumulated more and spent more in these years than he reported on his tax returns. This is in the nature of circumstantial evidence. Therefore, you should consider whether or not the Government has precluded every reasonable source of these funds except earnings for the years charged. However, the Government is not required to refute all possible speculation as to the source of these funds.

You are instructed the revenue laws provide that if the method of accounting employed by a taxpayer does not clearly reflect his income a computation may be made upon such basis and in such manner as, in the opinion of the Commissioner, does

fairly reflect such income. In this case the Revenue Agent was authorized and did undertake to ascertain the defendant's [423] income by two computations. The first is termed an unexplained expenditure computation. The second is termed an increase in net worth computation. Both are based upon the proposition that if a man accumulates more or spends more in a given year than his reported income, and if it is established that he did not get these funds by loan, inheritance, gift, savings or the sale of some property which he owned it would seem he must have received income. However, it is for you to determine whether the defendant's expenditures exceeded his reported sources of income and it is for you to determine whether or not he could have obtained the funds so expended from any source other than earnings.

Evidence is of two kinds, positive and circumstantial. Positive or direct evidence is said to be when the witness testifies directly out of his own personal knowledge to the matters in issue. Evidence is circumstantial when a witness testifies to matters having only an indirect or circumstantial bearing upon such issue.

Circumstantial or indirect evidence, under our law, as well as positive or direct evidence, is competent evidence and is to be given such weight as you determine it is entitled to.

You are instructed that throughout this proceeding the counsel for defendant has asserted that he may have accumulated money in previous years with which to make such investments and impliedly,

out of unexplained income. In a [424] prosecution for attempting to evade income taxes by filing false and fraudulent returns where government relies upon net worth method to establish defendant's income, the Government is not required to refute all possible speculation as to the source of defendant's asserted funds.

You are instructed that an attempt to evade income tax for each year is a separate offense. The indictment in this case, therefore, charges separate offenses. Count one charges an attempt to evade tax for the calendar year 1945. Count two charges an attempt to evade tax for the calendar year 1946.

The defendant, as you have observed, has not testified. This is his constitutional right. You will not infer guilt from this fact. You will not indulge in any presumption against him by reason of his failure to testify. A defendant in a criminal case, may, at his option, either take the witness stand and testify, or may remain silent. He may remain silent because the principle that the burden is upon the Government of showing his guilt and not upon him for proving his innocence. You are not to go to your jury room and imagine, surmise or conjecture what he might have testified to. You are to take the testimony as it has been presented here and reach a conclusion upon that and not upon any conjecture or surmise as to what any witness might have testified to if he had been sworn and called to the stand.

You will not consider any evidence which may have been ordered stricken from the record during

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the trial, nor will [425] you consider any evidence that may have been offered and rejected by the Court.

Your verdict should be based only on evidence submitted to you from the witness stand.

Counsel may have during their argument stated to you what they considered the evidence to be as to some fact or facts. I instruct you now, that if any statement concerning what the evidence was, is different than your recollection of the evidence, you will not take the statement of counsel but your own recollection. As I told you heretofore, you are the judges of the fact and it is for you to say what the evidence was, as submitted from the stand.

In this Court it is necessary that your verdict be unanimous. You will, when you retire, elect one of your number as foreman and when you agree upon a verdict your foreman alone need sign the verdict. Forms of verdict have been prepared for your use and you will have no trouble in using the form which correctly reflects your finding. You will find in the various forms, the words "guilty" and "not guilty" as to count one and count two. You will have your foreman sign the form indicating your finding on each count.

It is necessary that I consult with counsel on a matter of law and I will ask you to step into the jury room for a moment. You will be called back for your final instructions.

(In the absence of the jury.)

The Court: Does the Government wish to register [426] any exceptions to the Court's instructions?

Mr. Patten: None, your Honor.

The Court: Does the defendant wish to register any exceptions to the instructions as given?

Mr. Purdy: Regarding the instruction in which the Court made some comment as to the collection books.

The Court: You will have to specify what your exceptions are.

Mr. Purdy: We except to that portion of the Court's instruction in relation to the failure of the defendant to retain the sales slips, or collection slips.

The Court: You may have your exception.

(In the presence of the jury.)

The Court: Ladies and Gentlemen of the Jury; when I instructed you I made some comment concerning the failure of the defendant to produce these sales slips or tickets, check on the slot machines, or receipts from the slot machines. You understand that you are not to draw any inference from the Court's remarks, these are questions of fact for the jury, and you are not to be influenced by any remarks by the Court as to what the Court thinks about the testimony.

Now, Ladies and Gentlemen of the Jury, I will excuse you once more. You will be recalled.

(Jury excused.)

Mr. Emigh: We would like an exception to the failure of the Court to give the requested instruction that not only must the evidence prove guilt but that it must [427] prove the hypothesis of guilt to the exclusion of all other hypotheses.

The Court: You may have your exception.

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(The alternate jurors were excused and the jury retired to deliberate on the verdict.)

May 1, 1952, 8:30 o'clock p.m.

(Jury returned for additional advice and instruction.)

The Court: You have been deliberating for some eight hours, have you been able to agree upon a verdict?

Foreman: Not yet.

The Court: Is there any assistance the Court can give you? I don't want to know what the Jurors think but is there any questions you have?

Foreman: Yes, the question of circumstantial evidence, we would like that instruction.

The Court: Would you like me to give that again?

Foreman: Yes.

The Court: I will read the instruction. Would you like all the instructions again?

Foreman: Just as to circumstantial evidence.

The Court: Evidence is of two kinds, positive and circumstantial. Positive or direct evidence is said to be when the witness testifies directly out of his own personal [428] knowledge to the matters in issue. Evidence is circumstantial when a witness testifies to matters having only an indirect or circumstantial bearing upon such issue.

Circumstantial or indirect evidence, under our law, as well as positive or direct evidence, is competent evidence and is to be given such weight as you determine it is entitled to.

Either positive or circumstantial evidence will uphold a conviction.

Is there any other part of the instructions you would like?

Foreman: That is all.

The Court: I don't want to work a hardship on this case but I will ask you to consider it further. Of course, if you cannot agree and are satisfied of that, all you have to do is come in and tell the Court that you cannot agree and then I will determine what to do, you may retire to deliberate.

[Endorsed]: Filed July 25, 1952. [429]

[Endorsed]: No. 13482. United States Court of Appeals for the Ninth Circuit. Austin F. McFee, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Northern Division.

Filed: August 11, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 13482

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

AUSTIN F. McFEE, Defendant-Appellant.

MOTION FOR PERMISSION NOT TO PRINT EXHIBITS

Comes now the Appellant in the above entitled cause, through his Attorneys, and respectfully requests the above entitled court to grant its permission to permit all of the Exhibits herein to be not included in the printed record, but that said Exhibits may be considered, and be referred to, by the Court and Counsel as though contained in the printed record on Appeal. This Motion is made and based upon the Stipulation of the parties attached hereto.

Dated July 23rd, 1952.

/s/ J. F. EMIGH,
/s/ HAROLD S. PURDY.

ORDER

Pursuant to the above and foregoing Motion of Appellant and the stipulation of the parties,

It is hereby ordered that none of the Exhibits in the above entitled cause need be printed in the record, and that said Exhibits may be considered, and

be referred to, by the Court and Counsel as though contained in the printed record on Appeal.

Dated this 15th day of August, 1952.

/s/ WILLIAM DENMAN,
Chief Judge, U. S. Court of Appeals for the Ninth Circuit.

/s/ HOMER T. BONE,
/s/ WM. E. ORR,
Judges, U. S. Court of Appeals for the Ninth Circuit.

STIPULATION NOT TO PRINT EXHIBITS

It is stipulated and agreed by and between the parties hereto through their attorneys of record that none of the Exhibits in this cause need be printed in the record but that all of said Exhibits may be considered, and referred to, by the Court and Counsel as though contained in the printed record on Appeal.

Dated: July 9, 1952.

/s/ J. F. EMIGH,
/s/ HAROLD S. PURDY,
Attorneys for Appellant.
/s/ JOHN A. CONNER,
United States Attorney,
/s/ HERMAN J. ROSSI,
Assitant United States Attorney
Attorneys for Appellee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 19, 1952. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Comes now the appellant and, pursuant to Rule 19 (6) of the Rules of the above entitled Court does hereby set forth the points on which he intends to rely on appeal, as follows:

1. That the Court erred in denying the motion of defendant, Austin F. McFee, for a continuance.

2. The evidence is insufficient to justify the verdict of guilty in that:

a. There was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant violated Section 145 (b), Internal Revenue Code; title 26, U.S.C.A., Section 145 (b), as charged in Count One of the indictment.

b. There was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant violated Section 145 (b), Internal Revenue Code; title 26, U.S.C.A., Section 145 (b), as charged in Count Two of the indictment.

c. That there was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant had an income of $105,077.90 in the year 1945 or any other sum at all in excess of the sum of $25,166.57.

d. That there was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant owed the United States of America an income tax for the year 1945 in the sum of $71,076.35 or any other sum

or amount in excess of $10,021.05.

e. That there was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant had an income of $113,748.77 in the year of 1946 or any other sum at all in excess of the sum of $39,679.01.

f. That there was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant owed the United States of America an income tax for the year 1946 in the sum of $74,881.45 or any other sum or amount in excess of $18,091.35.

g. That there was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant did willfully and knowingly attempt to defeat and evade a large part or any other part of the income tax owing by him to the United States of America for the calendar year 1945.

h. That there was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant did willfully and knowingly attempt to defeat and evade a large part or any other part of the income tax owing by him to the United States of America for the calendar year 1946.

i. There was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant had the corrupt, dishonest or evil intent or motive necessary to support a verdict of guilty.

3. That the Court erred in denying defendant's

motion for judgment of acquittal at the close of the plaintiff's case for the reasons set forth in paragraph two hereof and in defendant's motion for judgment of acquittal.

4. That the Court erred in denying defendant's renewal of motion for judgment of acquittal at the close of all evidence in the case for the reasons set forth in paragraph two hereof and in defendant's renewal of motion for judgment of acquittal.

5. The verdict is contrary to law, and the instructions of the Court.

6. That the Court erred in permitting witnesses for the appellee to testify as to extra-judicial statements of the defendant without proof of the corpus delicti of the offense charged independent of proof of such extra-judicial statements.

7. That the Court erred by failing to instruct the Jury to the effect that circumstantial evidence, to entitle the Jury to convict thereon, must tend to prove all material allegations of an offense charged beyond a reasonable doubt and must be consistent and compatible only with the hypothesis of guilt and inconsistent with any other reasonable hypothesis.

8. That the Court failed to instruct the Jury generally on the force and effect of circumstantial evidence after the Jury returned from the Jury Room and requested instruction as to the law of circumstantial evidence.

9. That the Court in instructing the Jury as to the law of circumstantial evidence upon the Jury returning for instructions on that subject failed to

repeat the instructions given to the Jury and did so instruct the Jury as to tend to indicate to the Jury that circumstantial evidence in the case would uphold a conviction without admonishing the Jury that such evidence, however, must be compatible with, or support, only one reasonable hypothesis, namely that of guilt.

10. That the Court erred in giving the following instruction: "You are instructed that if you find substantial evidence outside of the defendant's own statements consisting of increase of net worth during the taxable years or any absence of personal records or books of account or the failure of books and records to show fully its transactions or those of the defendant then this body of testimony derives support from the defendant's failure to offset or explain the discrepancy through whatever means he might do so.

"I don't want to comment on the evidence, but there is one outstanding matter that you are left in the dark about, I don't intend to make any inference about it, as the evidence here is solely for you. But where are the tickets that should show the receipts and division of the money taken from the slot machines for the years 1945 and 1946. There was only one of these books of tickets introduced in evidence by the defense. None of the witnesses, bookkeeper, manager or other witnesses for the defense produced these tickets and all said they had no knowledge of these tickets. The tickets were traced to the possession of defendant McFee. It seems to the Court that if the tickets balanced with

the bank account that it would have been an easy matter for the defense to produce the tickets if they have not been destroyed. Why were they not produced to show the receipts of the slot machines for these years?

"The burden of proof resting upon the Government does not shift during the case but when in the trial of charges of income tax evasion discrepancies between the taxpayer's returns and his actual income are indicated by the Government's proof, the failure of the defendant to offer explanation in any form may be considered by you in finding your verdict."

In that by such instruction, duly excepted to, the Court indicated failure of the defendant to keep and produce daily collection books for the years 1945 and 1946, though the Internal Revenue agents had, for those years, and prior thereto, and subsequent thereto, access to all of Appellant McFee's records, and did not, so far as the evidence in this case discloses, at any time object or complain of the manner in which such collection books or records were kept or handled; that the evidence in the case clearly establishes that the contents of said collection books were correctly and truly entered in the permanent records of the Appellant McFee, to which the Internal Revenue agents had access, and that such collection books were nothing more in their nature than "sales slips", "tickets", or other temporary memoranda used for the purpose of preserving the matters thereon shown until en-

tered upon the permanent records of Appellant, and to verify collections with records of locations where amusement devices were operated; and there is no evidence in this case showing any discrepancy in any instance between the matters shown on collection books and matters shown on Appellant McFee's permanent records, and income tax returns.

That such instruction was misleading, confusing, argumentative, and prejudicial, to defendant, and tended to instruct the jury that there had been a failure on McFee's part to keep proper records and produce them at the time of the trial contrary to the evidence of the case.

That the Exhibit referred to by the Court in its instruction, Exhibit No. 39, was a blank book used for illustrative purposes only, and not a record or offered as a record.

That defendant was not required by law or regulations of the Commissioner of Internal Revenue to keep or preserve temporary records, but only such permanent records as he did keep and make available to the Collector of Internal Revenue.

That there is no evidence in the case justifying such an instruction.

11. The Court erred in denying appellant's offer of proof as to the records contained in defendant's exhibits Numbered 56 and 57 for the reason that said exhibits and the records therein contained, as indicated to the Court, were competent, relevant, material and sufficiently identified for the introduc-

tion thereof, and the denial of the offer of proof was prejudicial to the defendant.

Dated this 7th day of October, 1952.

/s/ HAROLD S. PURDY,
/s/ J. F. EMIGH,
Attorneys for Appellant.

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
State of Montana,
County of Silver Bow—ss.

Phyllis Knight, being first duly sworn, deposes and says that she is a citizen of the United States and the State of Montana, over the age of twenty-one years, and not a party to or in any manner interested in the above entitled case. That on the 7th day of October, 1952, she deposited in the United States Post Office at Butte, Montana, an envelope containing a true and correct copy of the hereunto attached Statement of Points Upon Which Appellant Intends to Rely on Appeal, addressed to John A. Carver, Esq., United States District Attorney, Boise, Idaho, with postage prepaid thereon.

That there is a regular United States mail between Butte, Montana, where defendant's attorney, J. F. Emigh, resides and has his office, and

Boise, Idaho, where John A. Carver, United States District Attorney resides and has his office.

/s/ PHYLLIS KNIGHT.

Subscribed and sworn to before me this 7th day of October, 1952.

[Seal] /s/ J. F. EMIGH,
Notary Public for State of Montana. Residing at Butte, Montana. My commission expires January 19, 1955.

[Endorsed]: Filed Oct. 9, 1952. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD DESIRED TO BE PRINTED

To: Paul P. O'Brien, Esquire, Clerk of the Above Entitled Court:

Appellant, Austin F. McFee, in the above entitled action, hereby designates the following portions of the record in said action, which he desires to be printed in the transcript of the record on appeal.

Indictment—Filed November 8, 1951.

Notice of Motion for Bill of Particulars—Filed April 2, 1952.

Notice of Amended and Supplemental Motion for Bill of Particulars—Filed April 2, 1952.

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Order for Bill of Particulars—Filed April 2, 1952.

Bill of Particulars—Filed April 3, 1952.

Motion for Continuance—Filed April 4, 1952.

Affidavit of Harold S. Purdy—Filed April 4, 1952.

Affidavit of J. F. Emigh—Filed April 4, 1952.

Order Over-ruling motion for Continuance—Filed April 4, 1952.

Amended Bill of Particulars—Filed April 22, 1952.

Motion for Judgment of Acquittal at Close of Plaintiff's case—Filed April 28, 1952.

Motion for Judgment of Acquittal at Close of all Testimony—Filed April 30, 1952.

Verdict of Jury—Filed May 1, 1952.

Judgment—Filed May 1, 1952.

Order staying Execution—Filed May 2, 1952.

Notice of Appeal—Filed May 12, 1952.

Bail Bond of Defendant in Sum of $10,000.00, pending determination of appeal.

Original Reporter's Transcript of Evidence of all Proceedings on trial of defendant, including return of jury requesting further instructions.

Order permitting withdrawal and transmittal of original exhibits.

Docket and journal entries, including date of filing this designation of record.

Order extending time to file transcript of record and docket cause in Appellate Court.

This designation of record on appeal and acknowledgment of service.

Certificate of the Clerk.

Order for Permission not to print exhibits.

Statement of points upon which Appellant intends to rely on appeal, with Proof of Service.

Dated at Butte, Montana, October 7, 1952.

/s/ HAROLD S. PURDY,
/s/ J. F. EMIGH,
Attorneys for Defendant and Appellant, Austin F. McFee.

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
State of Montana,
County of Silver Bow—ss.

Phyllis Knight, being first duly sworn, deposes and says that she is a citizen of the United States and the State of Montana, over the age of twenty-one years, and not a party to or in any mannner interested in the above entitled case. That on the 7th day of October, 1952, she deposited in the United States Post Office at Butte, Montana, an envelope containing a true and correct copy of the hereunto attached Designation of Portions of the Record Desired to Be Printed, addressed to John A. Carver, Esq., United States District Attorney, Boise, Idaho, with postage prepaid thereon.

That there is a regular United States mail between Butte, Montana, where defendant's attorney, J. F. Emigh, resides, and has his office, and Boise, Idaho,

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where John A. Carver, United States District Attorney resides and has his office.

/s/ PHYLLIS KNIGHT.

Subscribed and sworn to before me this 7th day of October, 1952.

[Seal] /s/ J. F. EMIGH,

Notary Public for State of Montana. Residing at Butte, Montana. My commission expires January 19, 1955.

[Endorsed]: Filed Oct. 9, 1952. Paul P. O'Brien, Clerk.

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No. 13482

United States
Court of Appeals
For the Ninth Circuit

AUSTIN F. McFEE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Idaho, Northern Division.

Proceedings Had in the United States Court of Appeals for the Ninth Circuit

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Thursday, July 30, 1953.

Before: Mathews, Healy and Orr,
Circuit Judges.

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. I. F. Emigh and Mr. Harold S. Purdy, counsel for appellant, and by Mr. John Lockley, Attorney, Department of Justice, counsel for the appellee, and submitted to the Court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Monday, August 24, 1953.

Before: Mathews, Healy and Orr,
Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

United States Court of Appeals
for the Ninth Circuit

No. 13,482

AUSTIN F. McFEE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Aug. 24, 1953

Appeal from the United States District Court for the District of Idaho, Northern Division

Before: Mathews, Healy and Orr, Circuit Judges.

Orr, Circuit Judge:

OPINION

Appellant was tried and convicted by a jury on two counts of an indictment for wilful attempts to defeat and evade income taxes due and owing by him for the years 1945 and 1946 in violation of § 145(b) of the Internal Revenue Code, 26 U.S.C.A. § 145(b). He was sentenced to imprisonment for one year and six months and a fine of $7,500 on each count, the terms of imprisonment to run concurrently; the imprisonment on count two to be suspended and appellant placed on probation for two years commencing after service of sentence on count one on the condition that appellant pay the amounts due the government on income tax.

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The judgment is challenged upon numerous grounds and we consider each contention in the order set forth in appellant's brief. The pertinent facts are set out in our consideration of each assignment of error.

I. Denial of Continuance

Appellant urges that the trial court erred in denying him a continuance. The indictment was returned November 8, 1951. Appellant was arrested November 17, 1951. He was arraigned April 1, 1952, and on that date the case was set for trial for April 22, 1952. On April 1, 1952, appellant asked for a bill of particulars. The bill of particulars was furnished April 2, 1952. Appellant asserts that it was not until then that he and his attorneys were advised that the Government had adopted the expenditure method of computing his income and tax. On April 4th he moved for a continuance and supported his motion with affidavits made by each of his two attorneys wherein they detailed certain investigations which they desired to make and to cause to be made in preparation for trial, which investigations, they averred, could not be accomplished within the time remaining before trial. "It is elementary that a matter of continuance rests in the sound discretion of the trial court, and its action in that respect is not ordinarily reviewable. It would take an extreme case to make the action of the trial court in such a case a denial of due process of law." Franklin v. State of South Carolina, 218 U.S. 161, 168.

This is by no means an extreme case. The affidavits filed by counsel in support of the motion present no facts from which a reasonable inference could have been drawn that substantial evidence supporting a defense would have been discovered. The showing, at most, was a request for time in which to make a search for new evidence. For some months prior to indictment appellant was represented by a firm of certified public accountants and by counsel. Surely, if a reasonable probability existed that a continuance would have enabled appellant to procure evidence not then known to him, a better showing would be expected in view of the expert assistance he had at hand and because of their presumed familiarity with his affairs. We see no prejudice resulting to appellant from the denial of a continuance. As a matter of fact the trial court exercised its discretion wisely by furthering an expeditious trial of the case. Such action is to be encouraged where, as here, the rights of a defendant are not jeopardized.

II. Sufficiency of the Evidence

In determining appellant's income the Government used both the expenditure and net worth methods. The two computations are merely accounting variations of the same basic method, the expenditure theory being an outgrowth of the net worth method. U. S. v. Caserta, 3 Cir. 1952, 199 F. 2d 905. Both involve a determination of the taxpayer's net worth at the beginning and end of a period in order to foreclose the possibility that the expenditures were made or the net worth increases

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were derived from prior accumulated funds. The underlying theory of the expenditure method is that if expenditures exceed reported income for the period and net worth has remained constant or changes otherwise accounted for, an inference may be drawn that total income was not properly reported. The theory of the net worth method is that if a taxpayer's net worth at the end of a particular period is greater than his net worth at the beginning of the period, and such increment is not attributed to gifts, devises, loans, or other non-income sources, the conclusion may be drawn that the increase in net worth represents income to the taxpayer. The net worth and expenditure computations of the Government both tended to show that appellant had failed to report taxable income of $79,911.23 in 1945 and $70,769.76 in 1946.

Appellant does not deny that his expenditures for the two years in question greatly exceeded his reported gross incomes. He asserts, however, that the Government's case must fall because it failed to establish a firm starting point for its determination of his net worth. He challenges the accuracy of the prosecution's computations first on the ground that the Government failed to exclude the hypothesis of funds other than income from which the substantial expenditures could have been made, and second, on the ground that certain known assets were omitted from the net worth statements.

Appellant contends, and we agree, that in a net worth case the Government must establish with a reasonable degree of accuracy the taxpayer's net

worth at the beginning and end of the period in question. We think this requirement was fully and adequately met in this case. There is no exclusive set of circumstances to foreclose the prior accumulation hypothesis. How much evidence must be offered by the prosecution before the trial court can properly submit the case to the jury depends upon the facts of the particular case. Remmer v. United States, 9 Cir., May 28, 1953, ... F. 2d ..... The Government is not required to refute all possible speculations as to the sources of funds from which the expenditures might have been made. Gariepy v. United States, 6 Cir. 1951, 189 F. 2d 459. We view the evidence in the light most favorable to the Government and affirm if the evidence is sufficient to justify the jury in finding therefrom, beyond a reasonable doubt, that there has been a wilful attempt to evade taxes. Gendelman v. United States, 9 Cir. 1951, 191 F. 2d 993.

In the instant case the establishment of appellant's net worth as of the beginning of the year 1945 was thorough and in detail. The revenue agents began their inquiry with the year 1935 and traced appellant's financial history through 1946. There was evidence that in 1934 and 1935 appellant moved from a $1.50 a day hotel room to the back room of a cinderblock building where he cooked his own meals to save expenses, that he was employed in a meat market at $50 to $60 a week, that he began the operation of North Idaho Sales Company about 1936 in partnership with his daughter with a maximum capital investment of $2,000, that

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the bank account was not always sufficient to cover a $12 a week check paid to an employee, that he filed no income tax returns in Idaho prior to 1936. From these facts the jury was entitled to infer that appellant was not in the possession of substantial assets as of the year 1935. The Government produced appellant's income tax returns and established the amount of income reported for the years 1936 to 1945 to negative the likelihood of his having accumulated a large surplus in those years. The agents examined appellant's records and books, bank accounts, court and county records to determine if there were any other possible sources of funds. He was given credit for all known borrowings and such amounts were eliminated from the income computations. The investigation was as full and complete as the Government could be reasonably required to make.

This evidence is substantial. The net worth computation was necessarily an estimate but, as such, was competent for the consideration of the jury. The Government's case is not destroyed by argumentative speculation, unsupported by evidence, that he might have had other substantial assets not taken into account by the Government. Appellant's voluntary admissions to the revenue agents that he had received no inheritances, that he had no other source of income than the known assets, and that $50,000 was all he had on hand as of January 1, 1942, serve only to corroborate the accuracy of the net worth statements.

Another argument of appellant in which we find

no substance is that there was fatal variance because the Government did not establish the exact source of the unreported income. The law is clear that proof of the exact amount or precise source of unreported income is not required. Jelaza v. United States, 4 Cir. 1950, 179 F. 2d 202; Gariepy v. United States, 6 Cir. 1951, 189 F. 2d 459. The jury was entitled to infer from the evidence that the unreported income came from one or all of the sources specified in the bill of particulars.

Appellant further attempts to attack the accuracy of the net worth statements by showing that certain known assets were omitted. There was testimony that the revenue agents were advised that appellant in 1943 personally had on hand approximately $114,000 in cash which he spent for liquor and which was not recorded on his business books. Substantial evidence appearing in the record justifies the inference that no such asset existed. The revenue agent testified that he did not give appellant credit for this item because it represented numerous purchases of whiskey and not a single transaction. Any whiskey on hand in 1945 was included in the net worth statement as inventory. He further testified that appellant informed him that this item would be accounted for on the Foresters Club books and that it related to whiskey inventory turnover. The contradictory and highly questionable testimony of R. E. McDonnell was the only affirmative evidence concerning this transaction. At one point during his testimony the trial court found it necessary to caution the witness against testify-

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ing falsely. The jury no doubt disbelieved McDonnell.

Two other items allegedly improperly omitted need no extended treatment since, even if we were to assume that appellant's contention is correct, the total amount involved could not affect the result. The challenged items amount to approximately $23,000 whereas the Government computations disclose a failure to report approximately $80,000 in 1945 and $70,000 in 1946. The Government is not required to prove the defendant's guilt to a mathematical certainty. Schuermann v. United States, 8 Cir. 1949, 174 F. 2d 397.

Appellant also claims that the two net worth statements were highly prejudicial to him because they both contain entries showing that he paid no income tax in 1945 or 1946 when in fact he did pay taxes for these two years. It is true that appellant overpaid his income taxes in 1944 and received a credit of $25,879.94 which was applied to his 1945 and 1946 taxes. The record does not disclose the year in which he received the income tax credit. Appellant concedes, however, that the treatment given this item by Government accounts had no affect whatever on the net worth computation. His complaint is that it was prejudicial to send to the jury statements which showed that he had paid no federal income tax during the two years in issue. We find no merit in this contention. It is clear that the jury had before it abundant evidence that appellant had paid taxes in these years. Appellant himself introduced a letter from the Treasury De-

partment crediting him with the overpayment of his taxes. His income tax returns were in evidence and there was testimony by a revenue agent that appellant had applied the tax refund to his 1945 and 1946 taxes.

III. Confidential Communications

Two lawyers, Messrs. Keane and Stern, who had on different occasions represented appellant, were called as witnesses by the Government and requested to testify. They made objection on the ground that the matters concerning which they were questioned were privileged because at that time the relationship of attorney and client existed between them and appellant. Their objections were overruled and answers were then given. Lawyer Keane testified to the effect that he had obtained $12,500 in currency from appellant on January 28, 1946, with instructions to purchase a cashier's check; that he had his secretary do so, and that another $3,000 check was handled the same way. On March 21, 1946, he received another $9,000, mostly in currency, of which he paid $7,500 for a cashier's check and gave $1,500 to Stern. He also testified about a $5,500 note receivable and a $4,700 check payable to McDonald, for which appellant advanced funds.

Lawyer Stern testified to the effect that he deposited $12,500 in the Dakota National Bank at Fargo, North Dakota, which was used partially to make payments to the District Court of the United States. He testified that he cashed a $3,000 check and gave the funds to appellant.

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The Government's purpose in eliciting the evidence from the lawyers was to show as a part of the expenditures that the sum of $16,500 was used by appellant in payment of fines in 1946.

We see no confidential relationship between attorney and client in the above transaction. The attorneys acted in the capacity of a transmitter, not as lawyers giving legal advice. The lawyers stand in the same relation as would a banker had one been commissioned by appellant to carry out what appears to be no more than clerical and messenger service. Pollock v. United States, 5 Cir. 1953, 202 F. 2d 281; cf. United States v. De Vasto, 2 Cir. 1931, 52 F. 2d 26.

IV. Failure of Court to Give Requested Instructions on Circumstantial Evidence

Appellant assigns as error the failure of the Court to give a requested instruction on circumstantial evidence.

Appellant makes a statement on page 21 of his brief that he excepted to the instructions given by the Court on circumstantial evidence. After setting out the instructions given by the Court it is stated:

"Counsel for defendant excepted to the above instructions as follows:

"Mr. Emigh: We would like an exception to the failure of the Court to give the requested instruction that not only must the evidence prove guilt but that it must prove the hypothesis of guilt to the exclusion of all other hypotheses.

"The Court: You may have your exception."

It is apparent that the exception was directed to

a requested instruction not given by the Court and not to the instructions given. The instructions given by the Court on circumstantial evidence, to which no exception was taken, states the law with much more clarity and force than does the alleged proffered instruction which the Court rejected. The jury was adequately instructed on this point.

V. Comment of the Court

During the course of its instructions to the jury the Court stated:

"You are instructed that if you find substantial evidence outside of the defendant's own statements consisting of increase of net worth during the taxable years or any absence of personal records or books of account or the failure of books and records to show fully its transactions or those of the defendant then this body of testimony derives support from the defendant's failure to offset or explain the discrepancy through whatever means he might do so.

"I don't want to comment on the evidence but there is one outstanding matter that you are left in the dark about, I don't intend to make any inference about it, as the evidence here is solely for you. But where are the tickets that should show the receipts and division of the money taken from the slot machines for the years 1945 and 1946. There was only one of these books of tickets introduced in evidence by the defense. None of the witnesses, bookkeeper, manager or other witnesses for the defense produced these tickets and all said they had no knowledge of these tickets. The tickets were

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traced to the possession of defendant McFee. It seems to the Court that if the tickets balanced with the bank account that it would have been an easy matter for the defense to produce the tickets if they have not been destroyed. Why were they not produced to show the receipts of the slot machines for these years?"

Appellant objected to the statements of the Court concerning the "tickets" and has assigned it as error.

The Court further charged the jury as follows:

"Ladies and Gentlemen of the Jury; when I instructed you I made some comment concerning the failure of the defendant to produce these sales slips or tickts, check on the slot machines, or receipts from the slot machines. You understand that you are not to draw any inference from the Court's remarks, these are questions of fact for the jury, and you are not to be influenced by any remarks by the Court as to what the Court thinks about the testimony."

And the Court gave the further cautionary instruction:

"If the Court has inferred, or if you should have gathered during the trial of the case that the Court has some opinion as to the facts in this case you will disregard that entirely. The matter of the guilt or innocence of the defendant as based on the facts presented to you here is a matter for your determination and yours alone and the Court has not intended to infer at any time that he had any feeling on the matter."

Other instructions were given where the function of the jury to pass upon the facts of the case was stressed.

Viewing the instructions of the Court as a whole, the statements complained of were not beyond the bounds of judicial propriety. United States v. Aaron, 2 Cir. 1951, 190 F. 2d 144, cert. denied, sub nomine Freidus v. United States, 342 U.S. 827; Todorow v. United States, 9 Cir. 1949, 173 F. 2d 439, cert. denied, 337 U.S. 925; Simon v. United States, 4 Cir. 1941, 123 F. 2d 80, cert. denied, 314 U.S. 694. It is obvious that the jury was clearly informed that it was left free to perform its fact-finding functions.

VI. Admissibility of Evidence of Admissions

Error is claimed in the admission of the testimony of agents of the Bureau of Internal Revenue as to statements made to them by appellant. This testimony, asserts appellant, was inadmissible because there is in the record no substantial independent proof of the corpus delicti. A reading of the record convinces us that not only does the independent evidence substantially corroborate the admissions (which in this circuit is sufficient, Davena v. United States, 9 Cir. 1952, 198 F. 2d 230), but, contrary to appellant's contention, goes further and establishes the corpus delicti by competent independent evidence.

Judgment affirmed.

[Endorsed]: Opinion. Filed Aug. 24, 1953. Paul P. O'Brien, Clerk.

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United States Court of Appeals
for the Ninth Circuit

No. 13,482

AUSTIN F. McFEE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Appeal from the United States District Court for the District of Idaho, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho, Northern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is, affirmed.

Filed and entered August 24, 1953.

United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 457 pages, numbered from and including 1 to and including 457, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 18th day of September, 1953.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

No. 914, October Term, 19~~53~~

AUSTIN McFEE,

Petitioner,

vs

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including ~~October 23~~, 19~~53~~.

S/ Tom Clark
Associate Justice of the Supreme Court of the United States

Dated this ~~17th~~
day of ~~September~~, 19~~53~~.